

UNITED STATES BANKRUPTCY COURT  
DISTRICT OF NEVADA  
LAS VEGAS DIVISION

IN RE: ) CASE NO: 06-10725  
 ) CHAPTER 11  
 )  
USA COMMERCIAL MORTGAGE COMPANY, ) Las Vegas, Nevada  
 )  
 ) Thursday, June 15, 2006  
Debtor. )  
 ) (10:16 a.m. to 2:04 p.m.)

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MOTIONS HEARING

BEFORE THE HONORABLE LINDA B. RIEGLE,  
UNITED STATES BANKRUPTCY JUDGE

Calendared Motions: See page 2

Appearances: See page 3

Court Recorder: Helen Smith

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CALENDARED MOTIONS:

- 1 MOTION FOR RELIEF FROM STAY PROPERTY: LOAN SERVICING AGREEMENT FOR DIRECT LOAN TO BOISE/GOWAN, LLC;
- 2 MOTION REGARDING PDG'S DISBURSEMENT OF INTEREST PAYMENTS TO DEBTOR;
- 3 MOTION FOR RELIEF ROM STAY PROPERTY: VARIOUS REAL PROPERTY (AFFECTS USA COMMERCIAL MORTGAGE CO.)
- 4 MOTION TO COMPEL DEBTOR TO CONTINUE TO FORWARD LENDER PAYMENTS TO DIRECT LENDERS; MOTION TO DELAY OR PROHIBIT APPRAISALS ON PERFORMING LOANS (AFFECT USA COMMERCIAL MORTGAGE CO);
- 5 MOTION TO TEMPORARILY HOLD FUNDS PENDING A DETERMINATION OF THE PROPER RECIPIENTS, AND MEMORANDUM OF POINTS AND AUTHORITIES (AFFECTS ALL DEBTORS);
- 6 MOTION FOR ORDER AUTHORIZING RETURN OF NON-INVESTED FUNDS;
- 7 MOTION FOR AUTHORIZING RETURN OF NON-INVESTED FUNDS;
- 8 APPLICATION TO EMPLOY LEWIS AND ROCA, LLP AS ATTORNEY;
- 9 JOINT MOTION FOR NUNC PRO TUNC ORDER CLARIFYING REQUIREMENT TO PROVIDE ACCESS TO INFORMATION

APPEARANCES FOR:

**Debtor:** ANNETTE JARVIS, ESQ.  
P.O. Box 45385  
Salt Lake City, UT 84145

LENARD SCHWARTZER, ESQ.  
Schwartz & McPherson Law Firm  
2850 S. Jones Boulevard  
Suite 1  
Las Vegas, NV 89146

**Official Committee of USA Capital First Trust Deed Fund, LLC, et al.:** FRANK MEROLA, ESQ.  
EVE KARASIK, ESQ.  
Stutman Treister & Glatt, P.C.  
1901 Avenue of the Stars  
12th Floor  
Los Angeles, CA 90067

**Official Committee of Equity Security Holders of USA Capital Diversified Trust Deed Fund, LLC:** ANNE LORADITCH, ESQ.  
Fox Rothschild, LLP  
3800 Howard Hughes Parkway  
Suite 500  
Las Vegas, NV 89169

MARC LEVINSON, ESQ.  
Orrick Herrington & Sutcliffe, LLP  
400 Capitol Mall  
Suite 3000  
Sacramento, CA 95814

**Official Committee of Executory Contract Holders of USA Commercial Mortgage Company:** GERALD GORDON, ESQ.  
GREG GARMAN, ESQ.  
Gordon Silver  
3960 Howard Hughes Parkway  
9th Floor  
Las Vegas, NV 89169

**Canepa Group, et al.:** LAUREL DAVIS, ESQ.  
Fennemore Craig, P.C.  
300 S. Fourth Street, #1400  
Las Vegas, NV 89101

**Boise-Gowan, LLC:** SUSAN SCANN, ESQ.  
Deaner Deaner Scann, et al.  
720 S. Fourth St. #300  
Las Vegas, NV 89101

APPEARANCES FOR: (CONTINUED)

Stanley Alexander Trust, ROBERT LE POME, ESQ.  
et al.: 10120 S. Eastern Ave., #200  
Henderson, NV 89052

Official Committee of SUSAN FREEMAN, ESQ.  
Unsecured Creditors for Lewis & Roca, LLP  
USA Commercial Mortgage 3993 Howard Hughes Parkway  
Company: Suite 600  
Las Vegas, NV 89169

J.V. Direct Lenders: JANET CHUBB, ESQ.  
Jones Vargas  
100 W. liberty Street  
12th Floor.  
P.O. Box 281  
Reno, NV 89504

U.S. Trustee: AUGIE LANDIS, ESQ.  
Assistant United States Trustee  
(No address provided)

Donna Cangelosi: DONNA CANGELOSI, ESQ., PRO SE

Norman Kiven: MARK KONRAD, ESQ.  
Snell & Wilmer, LLP  
3883 Howard Hughes Parkway, #1100  
Las Vegas, NV 89169

Leo Mantas, et al.: ERVEN NELSON, ESQ.  
10785 W. Twain Avenue  
Suite 200  
Las Vegas, NV 89135

Project Disbursement MATTHEW CALLISTER, ESQ.  
Group: Callister & Reynolds  
823 Las Vegas Blvd South  
Suite 500  
Las Vegas, NV 89101

Mountain West Mortgage, MARJORIE GUYMON, ESQ.  
LLC: Goldsmith & Guymon, P.C.  
2055 Village Center Circle  
Las Vegas, NV 89134

1                   **Las Vegas, Nevada; Thursday, June 15, 2006; 10:16 a.m.**

2                   **(Call to Order)**

3                   **THE CLERK:** All rise. Bankruptcy court is now in  
4 session.

5                   **THE COURT:** Be seated.

6                   Okay. USA Commercial. Appearances, please, in the  
7 courtroom.

8                   **(Pause; voices and whispers off the record)**

9                   Go ahead.

10                  **MS. JARVIS:** Annette Jarvis and Lenny Schwartzer on  
11 behalf of the debtors.

12                  **MR. MEROLA:** Good morning, your Honor. Frank Merola  
13 and Eve Karasik, members of Stutman, Triester, and Glatt,  
14 Professional Corporation, on behalf of the First Trustee  
15 Committee.

16                  **MS. LORADITCH:** Good morning, your Honor. Anne  
17 Loraditch of Beckley Singleton on behalf of -- or proposed  
18 counsel for Diversified Trust Fund Committee.

19                  **MR. LEVINSON:** Good morning, your Honor. Marc  
20 Levinson, Orrick, also proposed counsel for the Diversified  
21 Trust Fund Committee.

22                  **MR. GORDON:** Gerald Gordon and Greg Garman of Gordon  
23 Silver on behalf of the Official Committee of Direct Lenders.

24                  **MS. DAVIS:** Good morning, your Honor. Laurel Davis  
25 appearing on behalf of Scott Canepa and the Canepa Group.

1                   **MS. SCANN:** Good morning, your Honor. Susan Scann  
2 appearing on behalf of Boise-Gowan, LLC.

3                   **MR. LE POME:** Robert LePome for Dr. Stanley Alexander  
4 and 14 others.

5                   **MS. FREEMAN:** Good morning, your Honor. I'm Susan  
6 Freeman, Lewis and Roca, for the Unsecured Creditors Committee.

7                   **MS. CHUBB:** Good morning, your Honor. Janet Chubb of  
8 Jones Vargas for what we are now designating, pursuant to your  
9 directive, as the J.V. Direct Lenders.

10                  **THE COURT:** What's that stand for, junior varsity?  
11 Or --

12                  (**Laughter**)

13                  **MS. CHUBB:** I hope not.

14                  **MR. LANDIS:** Augie Landis for United States Trustee,  
15 Judge.

16                  **MS. CANGELOSI:** Donna Cangelosi representing herself  
17 as a direct lender for the Boise-Gowan Scott Canepa motion.

18                  **COURT RECORDER:** May I ask Counsel to spell your name  
19 for the record, please?

20                  **MS. CANGELOSI:** Yes. C-A-N-G-E-L-O-S, as in "Sam,"  
21 I.

22                  **COURT RECORDER:** Thank you.

23                  **MR. KONRAD:** Mark Konrad from Snell and Wilmer on  
24 behalf of Direct Lender Norman Kiven.

25                  **MR. NELSON:** Erven Nelson on behalf of Direct Lender

1 Leo Mantas and his group.

2           **MR. CALLISTER:** Matthew Callister, Callister and  
3 Reynolds, on behalf of Project Disbursement Group, your Honor.

4           **MS. GUYMON:** Marjorie Guymon appearing on behalf of  
5 Mountain West Mortgage, Direct Lenders, Power of Attorney.

6           **THE COURT:** Okay. Before we start, you know, I don't  
7 really like doing this, but I think this is the only way I'm  
8 going to get people's attention on pleadings and procedural  
9 matters. I've got a number of pleadings that my staff had to  
10 print off this morning, and I'm going to ask each of you --  
11 that we had to print off -- when you delivered your courtesy  
12 copy, and if you didn't, I'm going to sanction you \$75. So,  
13 the first form I happen to have is the reply.

14           Ms. Jarvis, when was that submitted? Reply in  
15 support of the motion to temporarily hold. When was that --  
16 when was the courtesy copy delivered? Or was one? And this  
17 morning doesn't count.

18           **MR. SCHWARTZER:** Your Honor, what day was it filed?

19           **THE COURT:** June 13th.

20           **MR. SCHWARTZER:** It should have been filed the same  
21 day.

22           **COURT RECORDER:** Will counsel make his appearance,  
23 please?

24           **MR. SCHWARTZER:** Lenard Schwartzer. Lenard  
25 Schwartzer, local counsel.

1                   Your Honor --

2                   **THE COURT:** We've got --

3                   **MR. SCHWARTZER:** -- my office has instructions to  
4 file them every day. I can't personally verify that it has,  
5 but if the mistake was made, it wasn't Ms. Jarvis's mistake; it  
6 was my office's mistake.

7                   **THE COURT:** Okay. Well, I don't have any courtesy  
8 copy for the replies for the motion to temporarily hold, nor  
9 your response to joint motion. So, unless you can show me that  
10 they -- that you have a runner slip that shows that they  
11 delivered that by -- it should have been within 24 hours, but  
12 same thing; 24 hours would be yesterday at noon, so that will  
13 be \$75 for each pleading.

14                  **MR. SCHWARTZER:** I understand, your Honor. We will  
15 either send a check or send a copy of the runner slip --

16                  **THE COURT:** Because I understand; sometimes -- you  
17 know, we're trying to get our system -- we're now going to have  
18 up in the clerk's office -- all courtesy copies are either,  
19 unless they're mailed timely to direction of Court Services,  
20 they're to be delivered to the clerk's office upstairs. They  
21 have a separate box. That box is -- we then check that box, I  
22 think, three times a day, and, of course, it's crucial in the  
23 day before the hearing because that's the only way I can be  
24 prepared, so --

25                  **MR. SCHWARTZER:** Yes, your Honor. Is there going to

1 be a time stamp for us to -- so we can make a copy --

2           **THE COURT:** You know, we could put one up there, I  
3 think. Couldn't we, Eileen?

4           **THE CLERK:** Sure.

5           **THE COURT:** Yeah. Just a little -- a self little  
6 time stamp?

7           **MR. SCHWARTZER:** Yes.

8           **THE COURT:** We get one for the casinos, for the  
9 parking garages.

10          (**Laughter**)

11          **MR. SCHWARTZER:** Well -- I must have one from one of  
12 my old casino cases --

13          **THE COURT:** Right.

14          **MR. SCHWARTZER:** -- in the garage.

15          **THE COURT:** Okay. Great. All right.

16          (**Laughter**)

17          **THE COURT:** Mr. Gilloon, when did you submit your  
18 opposition to joint motion? When did I get a courtesy copy of  
19 that? Is Mr. Gilloon here?

20          **THE CLERK:** I don't believe he's here.

21          **THE COURT:** He hasn't signed in.

22          **THE CLERK:** He didn't make an appearance.

23          **THE COURT:** All right.

24          Mr. LePome, when did I get a courtesy copy of your  
25 supplement to motion?

1                   **MR. LE POME:** Your Honor, my office was supposed to  
2 hand deliver those after our last conversation within five  
3 days, but I will double check on that.

4                   **THE COURT:** All right. Seventy-five dollars if it  
5 wasn't.

6                   Lewis and Roca, you're safe. I have "copy" stamped  
7 on here.

8                   I've got also the fourth supplemental declaration of  
9 Mr. Allison. We just got that today. I recognize that was  
10 just filed yesterday, but, you know, it needs to get here.

11                  And, then, I have another of Mr. Gilloon's  
12 supplemental brief. Excuse me. On Mr. Gilloon's opposition to  
13 joint motion I have a courtesy copy timely delivered. So, that  
14 was fine. I do not see a supplemental brief in opposition, so  
15 that's the one I'm concerned about.

16                  All right. Now, going to the substantive matters.  
17 Let's do first the motion to employ counsel; application to  
18 employ Lewis and Roca -- and Beckley. I'm sorry. That's on  
19 for the next hearing. It's the Lewis and Roca application.

20                  Yes. Go ahead.

21                  **MS. FREEMAN:** Your Honor, Susan Freeman on behalf of  
22 Lewis and Roca.

23                  There have been no objections to our application. We  
24 did, however, file a supplement last night, and I hope that it  
25 got to you; it was supposed to have been delivered to you; just

1 a supplemental disclosure. When the Orrick application was  
2 filed, they disclosed that they had a relationship with an  
3 entity that they thought had interned a relationship with Lewis  
4 and Roca. It is an entity that does calculations of amounts  
5 for purposes of our municipal bond clients, and we refer our  
6 clients to that entity. And, so, we've disclosed that we have  
7 that referral system where we sometimes refer clients. Lewis  
8 and Roca is not a direct client of Orrick, but that's it.

9           **THE COURT:** Okay.

10           **MS. FREEMAN:** So --

11           **THE COURT:** Now, and this is -- I'm trying to get a  
12 grasp, and I recognize the U.S. Trustee appoints the  
13 committees, and I recognize that it's their -- you know, in  
14 their discretion. But I'm trying to get a grasp on who the  
15 unsecured creditors are on this committee in light of the  
16 unusual nature of this case.

17           So, who are the -- not particularly who; what kinds  
18 of claims are we talking about?

19           **MS. FREEMAN:** The kinds of claims? Some claims are  
20 vendor claims. Some claims are note claims.

21           **THE COURT:** By that what do you mean?

22           **MS. FREEMAN:** Mr. Walker?

23           I'm sorry. I was not prepared to answer this  
24 particular question with respect to the nature of all of their  
25 claims.

1                   **THE COURT:** Do you mean note claim in the sense of  
2 somebody who had a loan but it never got secured?

3                   **MS. FREEMAN:** Yes, your Honor. An unsecured  
4 promissory note.

5                   **THE COURT:** Okay. So, they were never -- they never  
6 received an interest in a deed of trust.

7                   **MS. FREEMAN:** Correct, your Honor.

8                   **THE COURT:** Okay. As opposed to maybe receiving one,  
9 but it was paid off.

10                  **MS. FREEMAN:** Correct. I do believe that there are  
11 some out there who probably were direct lenders who end up  
12 being unsecured creditors and are constituents of this  
13 committee, but we don't have any on this committee to my  
14 knowledge.

15                  **THE COURT:** Okay. Okay. All right.

16                  Any comments? Any -- Mr. Landis?

17                  **MS. FREEMAN:** You probably know more about my clients  
18 than I do.

19                  **MR. LANDIS:** I can help a little, Judge. The  
20 individuals who are selected for the unsecured creditors  
21 committee -- and there are only five at this juncture -- are,  
22 in fact, either vendors or, as was suggested here, an unsecured  
23 noteholder. One gentleman was a consultant who was not paid  
24 for his services. There are -- there is still room for a  
25 seven-member committee to add individuals who may be

1 representative of just the kind of claim you touched on. We're  
2 cognizant that those exist, but until very recently we didn't  
3 know who they were.

4           **THE COURT:** Well, I'm not even sure -- and it's  
5 something you'll have to seriously think about, based upon the  
6 definitions that you've chosen for your committees -- I'm not  
7 so sure that somebody who wasn't a direct lender, that is,  
8 somebody who had the relationship whereby USA Commercial was  
9 the servicer and they were given a power of attorney to  
10 service, even if their loan was paid in full, I'm not so sure  
11 why they wouldn't be on the other committee.

12           **MR. LANDIS:** Your Honor, that's --

13           **THE COURT:** I recognize that presents problems for  
14 Mr. Gordon in the sense of maybe a conflict in a sense, because  
15 it's not a unified position, but maybe that's good as well.

16           **MR. LANDIS:** It is. And also the fact that, to the  
17 extent that we have been able to identify the lenders involved  
18 in the loans that have been identified as being paid off, they  
19 don't -- they are not constituents of the existing executory  
20 contract, but -- that's wrong -- they are not members of the  
21 existing executory contract; but we are taking a close look at  
22 that, Judge. I just simply wanted to let the Court know what  
23 the existing members --

24           **THE COURT:** Sure.

25           **MR. LANDIS:** -- of the unsecured committee are and

1 that we're aware of the other issue.

2           **THE COURT:** Okay. Fine. Thank you.

3           All right. So, that's approved.

4           **MS. FREEMAN:** Would you like me to upload an order  
5 or --

6           **THE COURT:** Yes, please.

7           **MS. FREEMAN:** -- a hand-writtend order? I will do  
8 that. Thank you.

9           **THE COURT:** Okay. And just sequence of events, after  
10 we finish the calendar, I want to discuss next week's hearings  
11 and indeed hear any objections to some or all of the matters  
12 that may have been put on a shortened time to understand fully  
13 if they really need to be on the next hearing. Then, after  
14 that I want to discuss some procedural matters on setting  
15 hearings for July 25th and the telephone number issue. So,  
16 just remind me at the end as we talk about sequence.

17           Okay. Go ahead, Mr. Allison.

18           **MS. JARVIS:** Your Honor, if I could just add that the  
19 issue that you just raised with respect to those, the direct  
20 lenders that are also unsecured creditors, because they do  
21 hold -- or some of their loans were paid off pre-petition and  
22 they were not paid for that, most of those do also hold other  
23 direct lender interests. And that issue is an issue that's not  
24 before the Court at this time, but it may be raised, because we  
25 are in discussion with the U.S. Trustee respecting that group

1 of direct lenders.

2           **THE COURT:** Okay. Why don't you give us an update as  
3 to where we are, getting ready for our schedules, your  
4 analysis, what (indiscernible) analysis shows of the status of  
5 loans, et cetera. And I recognize this will all fit in later,  
6 and, of course, to the extent anybody needs testimony, we can  
7 handle it that way, but I just want to get an overview now.

8           **MS. JARVIS:** We are completing our statements and  
9 schedules today. They will be ready to be filed. It's been a  
10 monumental effort, and I think Mesereaux (phonetic) has done a  
11 great job of trying to be as accurate as possible, has had to  
12 recreate basically most of the records of the debtor, and those  
13 statements and schedules will be based on that recreation.

14           They also will be sending out initial --

15           **THE COURT:** When you say "ready to be filed," what  
16 day will they be filed?

17           **MS. JARVIS:** Today.

18           **THE COURT:** Today. Okay.

19           **MS. JARVIS:** Today. So, it will be this afternoon.

20           **THE COURT:** And I forgot; when is the creditors  
21 committee meeting, the continued one?

22           **MS. JARVIS:** It is --

23           **MR. LANDIS:** July 12th.

24           **MR. MEROLA:** July 12th.

25           **MR. UNIDENTIFIED:** July 12th.

1                   **THE COURT:** Oh, July 12th. Okay. Good.

2                   **MS. JARVIS:** They will also be sending out investor  
3 statements with respect to the lenders' interests in each loan.  
4 Those, however, will only be up through the petition date  
5 because that, of course, is what was done in order to prepare  
6 the statements and schedules since that is, you know, kind of a  
7 snapshot as of the petition date. Those will be further  
8 updated; further work needs to be done on that. And by around  
9 July 1st those will be updated so that we can bring them  
10 current for as close to possible through the end of June.  
11 There have been significant collections that have been made by  
12 the debtors since the petition was filed, and that would  
13 impact, then, the initial statements that would be sent out to  
14 the investors. So, by early July we should have an idea of an  
15 investor-by-investor reconciliation as well as the loan-by-loan  
16 reconciliation.

17                  **THE COURT:** Generally speaking, have we found more  
18 loans performing or have moved -- which category have they  
19 moved into, or has it stayed the same?

20                  **MS. JARVIS:** Well, some of them have been collected  
21 by the debtors post-petition. Those -- we have several loans  
22 that have been collected, those that would be performing,  
23 because they would have been paid off.

24                  **THE COURT:** Oh, you mean as in paid off.

25                  **MS. JARVIS:** Yes.

1                   **THE COURT:** Okay.

2                   **MS. JARVIS:** Where they have actually -- you know,  
3 for instance, loans were past due and the debtor has been, you  
4 know, vigorous in meeting with borrowers and collecting those,  
5 and in some instances they have been able to collect the entire  
6 amount of the loan. And that money is sitting in the  
7 collection account waiting to be disbursed. As we indicated,  
8 we will file a motion to have that heard on the 25th so we can  
9 disburse all that money. There have been in other instances  
10 past due interest that had been collected --

11                  **THE COURT:** You mean July -- to the July 25th date.

12                  **MS. JARVIS:** Yeah, July 25th. Sorry.

13                  **THE COURT:** Uh-huh.

14                  **MS. JARVIS:** Yes. There also has been some instances  
15 of past due interest collected, which would bring the loans, in  
16 some cases --

17                  **MS. UNIDENTIFIED:** Performing.

18                  **MS. JARVIS:** -- in some cases performing from non-  
19 performing, so there has been some change in that. There  
20 were -- there also has been identified -- I think it's four  
21 loans that were paid off pre-petition that were not -- the  
22 money was not paid over to the investors, so, that -- you know,  
23 on the schedule that we looked at last week there were a lot of  
24 to-be-determineds on there. Those now have been -- are able to  
25 be filled in with respect to where they were at the petition

1 date. By early July those will be brought up to where they  
2 are, you know, currently, or towards the end of June.

3 **THE COURT:** Okay.

4 **MS. JARVIS:** So, that has been done.

5 One other thing that we have to mention to your Honor  
6 is your Honor did grant us a motion allowing us to return the  
7 funds on the Bundy Canyon situation, and I would just state  
8 that we have -- it's been very frustrating for us, frankly,  
9 because we've had difficulty in getting these, you know, escrow  
10 companies, other companies, to -- basically, to not violate the  
11 stay and to obey court orders. And there has been -- I think  
12 part of it is, it's our guess, that maybe they're getting  
13 pressure or calls from investors who probably don't -- you  
14 know, have their own issues and don't really understand, you  
15 know, what is going on, but it's delayed things. And it's my  
16 understanding that finally we've broken the locker jam and that  
17 Orange Coast Title, who was the escrow agent holding that Bundy  
18 Canyon money that the Court ordered to be disbursed, will be  
19 disbursing, I believe, today.

20 **THE COURT:** Okay. And remind me. That money goes  
21 back to -- this was a loan that was going to be made, then  
22 wasn't made, so it's going back to those people who invested  
23 it.

24 **MS. JARVIS:** That is correct.

25 **THE COURT:** Okay.

1                   **MS. JARVIS:** That is correct. It was one that the  
2 money was put in escrow but the loan was never actually made  
3 prior to the petition date, and we had sought and received an  
4 order to allow that money to go back. So, there has been some  
5 delay because of the difficulties in getting the escrow agent  
6 to do what the Court has ordered to do, so that, however, I  
7 believe, has been resolved finally without having to come back  
8 and --

9                   **THE COURT:** Okay.

10                  **MS. JARVIS:** -- get another order from the Court.

11                  **THE COURT:** All right. Let's go next -- skip the  
12 Canepa motion for a moment and go to the PDG Disbursement  
13 motion.

14                  **MR. CALLISTER:** Yes, your Honor. Once again, Matthew  
15 Callister on behalf of Project Disbursement Group, also known  
16 as PDG. This is a --

17                  **THE COURT:** Now, has this been -- the stipulation  
18 that was filed -- you're still -- so that I'm clear -- you're  
19 still willing to abide by the stipulation; it was just --

20                  **MR. CALLISTER:** We are. We just have not received it  
21 back, your Honor. That's the difficulty. So, our motion was  
22 actually set before the stipulation was circulated by all  
23 parties.

24                  **THE COURT:** It's now been signed, hasn't it?

25                  **MR. CALLISTER:** I have not received an executed copy,

1 and I noticed that in the response filed by Mr. Schwartzer they  
2 indicate that it's still being circulated. You'll recall the  
3 Court --

4           **THE COURT:** Right.

5           **MR. CALLISTER:** -- wanted it passed by the various  
6 committees, and my suspicion is just because it's taken some  
7 time to get the committees formed, that's why it has not been  
8 returned.

9           **THE COURT:** Okay. All right.

10          So, does anybody have any objection to that stip --  
11 and you might as well go through again what you were intending  
12 to do.

13          **MR. CALLISTER:** Essentially, your Honor, we had  
14 executed a stipulation agreeing to -- against the -- as counsel  
15 just indicated, there were a number of complaints beginning in  
16 March from individual investors saying, "Hey, don't remit the  
17 interest reserves, because it hasn't been disbursed out to us."  
18 And, so, that was the cause of the delay. We appreciate the  
19 Court's direction, and we haven't really received an objection,  
20 just kind of a comment saying, "Yeah, we'd like to have that  
21 four million released." We're happy to do so. That four  
22 million, approximately, that we're holding represents some 22  
23 projects, your Honor, and we're just seeking permission from  
24 the Court to --

25           **THE COURT:** And that gets turned back to the

1 debtor -- I mean to USA --

2                   **MR. CALLISTER:** Well, there's monthly -- Project  
3 Disbursement Group would make disbursements as appropriate to  
4 various third-party contractors, materialmen, subcontractors,  
5 et cetera. That -- we've done that. We've continued to do  
6 that. It's the interest reserve portion that became a  
7 controversy, and, presumably, if the Court grants the motion  
8 today, then we will resume releasing the interest reserve as so  
9 ordered by the debtor, but that goes back, as I understand it,  
10 to just another arm of the debtor for ultimate distribution out  
11 to the --

12                   **THE COURT:** Correct.

13                   **MR. CALLISTER:** -- individual --

14                   **THE COURT:** In accordance with the contracts.

15                   **MR. CALLISTER:** Correct.

16                   **THE COURT:** Okay.

17 Any comments?

18                   **MS. JARVIS:** I would just add an explanation, your  
19 Honor. There are two parts of this escrow. One is the --  
20 there was basically pre-funded interest that is to be paid out  
21 of these escrow accounts on a monthly basis; so, for instance,  
22 some of the loans in the schedule we initially had marked them  
23 as non-performing. They were non-performing because the escrow  
24 agent was not -- or the disbursing agent was not disbursing the  
25 interest once the bankruptcy was filed. In the last schedule

1 we actually just footnoted those and said they would performing  
2 if the interest was released. So, once this is signed, that  
3 interest will be released and those loans that have that  
4 interest escrow will then become performing loans.

5 The second part of it is the disbursing agent  
6 actually holds some construction funds that are released to  
7 borrowers on a basis, you know, in accordance with the loan  
8 agreement and as agreed to by the debtors. Those also have  
9 been held up. You know, those are essential for the borrowers  
10 to continue to be able to pay their, you know, vendors and  
11 other, you know, construction claims. So, both of those would  
12 be released, then, to the debtors to be held in their  
13 collection account with respect to the interest escrow net of  
14 whatever servicing fee that they're entitled to and to the  
15 borrowers with respect to the construction funds that are held.

16 **THE COURT:** Okay. All right. And I assume the  
17 committees had no objection and U.S. Trustee had no objection.  
18 That was my only concern before. I wanted to make sure that  
19 everybody either -- it was a stipulation, everybody agreed to  
20 it, this procedure of just bringing on probably saves in the  
21 long run.

22 **MR. LANDIS:** United States Trustee has no objection,  
23 your Honor.

24 **THE COURT:** All right. So, that's approved.

25 **MR. CALLISTER:** Thank you, your Honor.

1                   **THE COURT:** Uh-huh.

2                   **(Pause)**

3                   All right. Let's next go to -- I happen to have  
4 first on here Ms. Davis's motion to lift stay.

5                   **MS. DAVIS:** Yes. Thank you, your Honor. I need to  
6 make a few adjustments. I'm not nearly as tall as the rest of  
7 the people who have been here before me. Whoops.

8                   **THE COURT:** It's counter-intuitive.

9                   **MS. DAVIS:** Up or down.

10                  **(Laughter)**

11                  There. That's better. I'll try not to deafen the  
12 Court and counsel while I get myself set up. Thank you, your  
13 Honor.

14                  As your Honor is aware, this is the motion for relief  
15 from the automatic stay to terminate the loan servicing  
16 agreement with respect to the direct loan to the Boise-Gowan 93  
17 LLC. This is a motion brought in the name of Scott Canepa only  
18 because he is a direct lender in this loan and none of the  
19 other members of the Canepa Group are. As evidenced by  
20 Exhibit L to the supplemental declaration of Mr. Canepa, this  
21 motion has the support of ten of the 17 direct lenders on this  
22 loan, holding total beneficial interest in the amount of  
23 \$1.9 million of the \$2,425,000 loan.

24                  In order to decide this motion, your Honor, we need  
25 to focus on specifics, not generalities. This case has a swirl

1 of generalities and possibilities and connections that connect  
2 the dots and you're there. There has been a tremendous effort  
3 by USA Commercial to, in fact, connect the dots among people,  
4 circumstances, events that really don't connect. They do this  
5 to demonstrate the alleged complexity of the case and to  
6 provide some justification for the, quote, "confidential  
7 negotiations" that have been undertaken with borrowers as a  
8 justification to withhold information and reports. Indeed,  
9 there has been great efforts made to create relationships among  
10 borrowers through their principals that, frankly, don't exist.

11                 The largest connection that we have with the borrower  
12 is the USA Investment Partners, LLC, entity. The two members  
13 of this entity are Tom Hantges and John -- and Joe Milanowski.  
14 Now, they're not part of this loan, but they are the former  
15 management of USA Commercial and the other four debtors here.  
16 And they've certainly been vilified in the press, and they are  
17 the men responsible for the alleged pre-petition irregularities  
18 that we have heard so much about here in these proceedings.

19                 This entity and these two men are also the subject of  
20 the June 21st motion to approve a security agreement on a  
21 previously unsecured loan of \$57 million. That motion is set  
22 to be heard next Wednesday. Now, of course, that motion fails  
23 to address the impact of eliminating \$57 million of these  
24 persons' assets from the pool of assets that would be available  
25 to satisfy the personal guarantees that were made by

1 Mr. Hantges and Milanowski for the loan portfolio here. And  
2 those guarantees were a significant component of the loan  
3 solicitations made on the loan portfolio here.

4 Meanwhile, USA Commercial continually seeks to expand  
5 the scope of the case and the related debtor cases, to expand  
6 the Court's jurisdiction over third parties who are not  
7 creditors, to find connections everywhere. We have 115 loans  
8 and a billion-dollar loan portfolio. They relate to 93  
9 projects. We have 3,600 individual direct lenders. I  
10 represent 13 of them; 13 different persons and entities. They  
11 are not all Scott Canepa. There are a whole bunch of different  
12 people. They were all fully disclosed in our 2019 disclosures  
13 required by the Court.

14 So, not enough complexity? Let's look at the two  
15 funds. We have the Capital First fund. We have 53 loans;  
16 1,300 members. The Diversified Fund: It has a participation  
17 in 23 loans; it has seven loans in which it's the single  
18 lender; 1,900 members in that fund.

19 We had lots of talk in this case about estate  
20 revenues from the loan servicing agreements. There have been  
21 some really big numbers mentioned in the motions and some big  
22 numbers mentioned in the declarations and the budgets. Curious  
23 that we have a \$15 million budget for administrative costs set  
24 for a hearing on June 21st. That dollar amount is absolutely  
25 breathtaking. And what is absolutely overwhelming is the fact

1 that there is no corresponding motion to pay the direct lenders  
2 and the direct investors any of the money that's being held on  
3 their behalf before the debtor's current management seeks the  
4 disbursements -- seeks to obtain court approval of disbursement  
5 of funds for administrative costs. That's simply outrageous,  
6 your Honor.

7 There have been efforts to infer that the entire  
8 billion dollars is property of the estate, which, of course, it  
9 is not. The legal question of what is and is not property of  
10 the estate has been exhaustively briefed in my points and  
11 authorities, and I will not repeat it now.

12 Focusing on this Boise-Gowan loan, the only possible  
13 property of the estate for the loans funded by the direct  
14 lenders, which are evidenced by notes and deeds of trusts in  
15 their name specifically identified to them with funds  
16 identifiable held in a separate designated account post-  
17 petition by the debtor's management -- and there is also some  
18 of this money on deposit with PDG as part of the motion that  
19 your Honor just heard there as well; they are handling the  
20 disbursement of the interest reserve and some of the funds for  
21 the borrower, as well. So, the rest of the direct lender money  
22 in USA's interest -- excuse me -- in USA's bank accounts is  
23 limited to their possession of money that belongs to a bunch of  
24 other people; the direct lenders.

25 Of course, USA has never squarely addressed the

1 executory contracts issue. The briefs establish that the loan  
2 servicing agreements are, in fact, executory. We have  
3 repeatedly pointed out that you can't rely upon these  
4 agreements as property of the estate until you formally assume  
5 them as required under the bankruptcy code.

6 I need to clarify one more issue that really wasn't  
7 fully briefed in my points and authorities. There is some  
8 concern that the non-monetary breaches that occurred under  
9 these agreements pre-petition may not be susceptible of cure  
10 under the *Claremont* case such that they could be assumed post-  
11 petition.

12 But still we have more and more generalities in the  
13 case. What we need to do now is have some focus and  
14 specificities. These alleged connections, they just don't hang  
15 together. The numbers that we're talking about for Boise-  
16 Gowan, they're just not that large. They demonstrate the minor  
17 impact of this small, short-term loan of one year that was made  
18 in August of 2005, matures in August of 2006, has a current  
19 principal balance of \$2,425,000. It's a land acquisition loan  
20 for real property located in Boise, Idaho. That's the Boise-  
21 Gowan loan.

22 We have 17 investors -- excuse me -- direct lenders,  
23 your Honor. These are persons and entities who have absolutely  
24 no connection to the debtors in possession other than their  
25 loan servicing agreements and possible other investments in

1 other loans. What we don't have is we don't have USA  
2 Commercial as a direct lender; we don't have either one of the  
3 funds as a direct lender. This is the only loan that Scott  
4 Canepa made in his name only.

5           **THE COURT:** But how do I lift the stay -- I recognize  
6 you say that he has no other loans, so he can't be charged  
7 with -- "charged" meaning you can't -- or one can't argue that  
8 he would owe the estate money by virtue of being overpaid. But  
9 what about the other ten people? Or what about the other  
10 people?

11           **MS. DAVIS:** Well, you know, that argument supposes --  
12 presupposes that USA Commercial has the right to unilaterally  
13 withhold the funds --

14           **THE COURT:** Well --

15           **MS. DAVIS:** -- based upon some setoff or other --

16           **THE COURT:** Why --

17           **MS. DAVIS:** -- inchoate argument.

18           **THE COURT:** Think about it. What if I'm the  
19 servicing agent for Countrywide Mortgage and Ms. Jarvis makes a  
20 payment on her loan and I attribute it to your loan? It seems  
21 to me just common sense that I, as a servicing agent, would  
22 have the absolute right to, when your payment comes in,  
23 attribute it to Ms. Jarvis's loan, or at least do some offset.  
24 And if we send the servicing loan out, you lose the ability to  
25 offset those rights. I mean, let's assume it was a mistake. I

1 think clearly in the contracts you've got -- they've got the  
2 right to withhold. Well, there's definitely to withhold. It  
3 says pay where proper. So, presumably, it wasn't properly  
4 paid. Why don't they have the right of offset and -- I want to  
5 say "retrofit." Uh --

6 **MS. DAVIS:** Recoupment, is your Honor thinking?

7 **THE COURT:** Recoupment.

8 **MS. DAVIS:** Well, your Honor, the way that we have  
9 analyzed this issue -- and I appreciate your Honor's position,  
10 and I know that's the position that's been espoused by the  
11 debtors in this case -- they have never really articulated the  
12 facts and circumstances that give rise to this alleged setoff  
13 right. And we're also talking about the dichotomy of pre-  
14 petition versus post-petition. You know, there are many  
15 principles in the bankruptcy code that draw a straight line  
16 between things that happened pre-petition and things that  
17 happened post-petition.

18 **THE COURT:** Well, all these things would have  
19 happened pre-petition. So, in other words, if they were  
20 overpaid pre-petition, they need to preserve that right to set  
21 it off against maybe other parties, because if they're not  
22 being paid -- that's your complaint; they haven't been paid --  
23 wouldn't they have a right to offset that? Or recoupment  
24 doesn't require -- recoupment is a broader doctrine. It  
25 doesn't require that one to one.

1                   **MS. DAVIS:** Yes, absolutely. I understand that, your  
2 Honor. But they are defensive strategies, not affirmative  
3 claims. Plus, they need to be asserted in the context of an  
4 adversary proceeding. You don't just file a motion and say,  
5 "Judge, let me hold everybody's money until we figure out what  
6 to do with it."

7                   Second of all, most of the declarations that have  
8 been filed by Mr. Allison admit that these errors were made by  
9 former management of the debtors. Why is it, then, that based  
10 upon their mistakes, they are now going to take money that  
11 they're holding in trust as a res for direct lenders and other  
12 parties, they're somehow able to, you know, adjust the equities  
13 of that money when it's not their money?

14                  **THE COURT:** Well, no, they're not. I mean, the point  
15 is, and what I meant to say was, that if a particular lender  
16 was overpaid, why wouldn't that lender not be entitled to  
17 receive a payment on that lender's particular loan until such  
18 time as it was adjusted? I mean, if they were overpaid, they  
19 don't have a right to receive any more payments.

20                  **MS. DAVIS:** But your Honor is assuming that the facts  
21 that have been alleged and not proved are true. I mean --

22                  **THE COURT:** But I don't have any evidence from the  
23 rest of those ten people or the rest of the people on those  
24 loans that they have absolutely nothing due to them --

25                  **MS. DAVIS:** No, you don't --

1                   **THE COURT:** -- but they don't owe anything.

2                   **MS. DAVIS:** That is true, your Honor. I have not  
3 provided that information.

4                   **THE COURT:** And the problem is you can't just say,  
5 okay, so, fine; the one person goes out and gets another  
6 servicer. It doesn't work that way. The whole loan has to go  
7 that way.

8                   **MS. DAVIS:** Yes; and that's why we did solicit and  
9 obtain the support of so many persons holding so many --

10                  **THE COURT:** Right. So, if I'm number -- if I -- now,  
11 let's see; you've got ten out of the 17. If I'm number 12 and  
12 I know I'm owed a lot of money, I'm safe. I have now been  
13 whisked out of this process --

14                  **MS. DAVIS:** But, you know, your Honor, with all due  
15 respect, as I briefed in my points and authorities regarding  
16 this motion, the motion to hold funds, and pretty much  
17 everything that I filed before your Honor, I have a real  
18 problem with the procedural posture of these allegations. Why  
19 don't they just have a cause of action that arose pre-petition  
20 to sue people to recover this back? Why do they have the  
21 unilateral right to withhold their money and set off? You  
22 know, somebody has to establish that. You don't just sit there  
23 and hold all the money until you figure it out.

24                  **THE COURT:** But they're saying they're going to have  
25 this filed by July 25th.

1                   **MS. DAVIS:** Right, your Honor; but these bankruptcy  
2 cases were filed on April 13th. And I --

3                   **THE COURT:** Well, it's two months.

4                   **MS. DAVIS:** I appreciate that, your Honor, but some  
5 of these people depend on this money to live; not specifically  
6 Scott Canepa, but certainly some of the other folks who are in  
7 these direct investments and direct loans.

8                   **THE COURT:** I understand that. But how is that any  
9 different from the person who has a deed of trust on the  
10 shopping center?

11                  **MS. DAVIS:** Well, your Honor, I would respectfully  
12 disagree that they have a unilateral right to withhold the  
13 funds. I understand that what your Honor is saying is that you  
14 are perhaps recognizing some sort of a possessory right or  
15 interpreting the loan servicing agreement such that they would  
16 have some entitlement to do so. My points and authorities and  
17 the position we have taken respectfully disagree. We strongly  
18 believe, your Honor, that as a fiduciary, under both the loan  
19 servicing agreements and under Nevada law, in a regulated  
20 industry, with a limited license --

21                  **THE COURT:** Well, but what if your clients -- what if  
22 it turns out that this loan is only being paid because the  
23 interest reserve is there? And, so -- or let's assume one of  
24 the other ten people, or Mr. Canepa on another loan -- let's  
25 assume he on another loan is not performing.

1                   **MS. DAVIS:** Okay. Can I start with that one, your  
2 Honor? First of all, Scott Canepa holds only one loan in his  
3 own name.

4                   **THE COURT:** Okay. So, his member -- the other people  
5 you represent; and you represent 13 people, so those people  
6 have loans in other things.

7                   **MS. DAVIS:** They do.

8                   **THE COURT:** Now, when the one person like Mr. Canepa  
9 comes along and says he wants to lift stay and send the  
10 mortgage out, aren't you going to say, "No, I want it to stay  
11 here because I want my people to be offset for what they didn't  
12 get by the person who was overpaid"?

13                  **MS. DAVIS:** Your Honor, I appreciate that this is a  
14 complex and difficult issue.

15                  **THE COURT:** I mean, isn't that a position that you  
16 probably want to take?

17                  **MS. DAVIS:** No, your Honor. No one has demonstrated  
18 that these people aren't judgment proof. They have a  
19 continuing relationship. No one has demonstrated that if they  
20 make a demand the payments won't be made back.

21                  **THE COURT:** Well, but some of these people supposedly  
22 depend upon the payments. I mean, they've got a million  
23 dollars in loans. Presumably, some of those loans are payable.  
24 If you've got a million dollars in -- if you put a -- deposit a  
25 million dollars with USA Capital, you've got to have some

1 money.

2           **MS. DAVIS:** I understand. And I respectfully  
3 disagree, your Honor. I mean, I hear what you're saying, and I  
4 think I know where your Honor is going with this, but with all  
5 due respect, the direct lenders in the Boise-Gowan loan have  
6 negotiated a specific transaction with USA Commercial and with  
7 the borrower, Boise-Gowan, and the rights and obligations under  
8 those respective contracts. And the Nevada law statutory  
9 obligations of a mortgage broker and a mortgage servicing agent  
10 require that the money not be held. I mean, there seems to me  
11 that there has to be more of an affirmative demonstration that  
12 they're entitled to do what they're claiming to do.

13           It's one of the points I was making at the beginning  
14 of my argument, your Honor, and that is, is that -- you know,  
15 there is a big morass here. There is a bunch of confusion,  
16 there's connections, there's possibilities, and whatever. If  
17 you'll recall, your Honor, on the first day of this case, I  
18 believe the debtor's counsel walked in here and told you that  
19 this case was similar to the Lemon's (phonetic) case. Now  
20 they're backing off that position. I understand and appreciate  
21 that they have to do forensic accounting. Where I disagree and  
22 where the arguments break down is that I don't agree that they  
23 have to hold the money until they do that, and I don't agree  
24 that in the process of holding the money they get to breach the  
25 contracts.

1               Now, let's talk about the breaches of the loan  
2 servicing agreement here. We have two post-petition payments  
3 that haven't been made. This is a performing loan. And, yes,  
4 your Honor, it does have an interest reserve with PDG that we  
5 just talked about. Again, it was a loan takedown for raw land.  
6 It matures on August 26th. So, we have the two post-petition  
7 breaches of payment. But let's talk about the loan servicing  
8 fee for a moment.

9               **THE COURT:** Well, what happens on August 22nd if the  
10 loan doesn't perform?

11               **MS. DAVIS:** Twenty-sixth. They're in default.

12               **THE COURT:** And then what are you going to do?

13               **MS. DAVIS:** Well, initiate a foreclosure proceeding  
14 just like any other loan servicing agent would. And, in fact,  
15 your Honor, the loan -- excuse me -- the foreclosure  
16 proceedings in Boise, Idaho, are the same as they are here in  
17 Las Vegas, Nevada. They have a power of sale, non-judicial  
18 sale, it's a 120-day time period, and they have a one action  
19 rule issue as well. Those are --

20               **THE COURT:** And, so, of course, your clients would be  
21 charged with the expenses of doing that.

22               **MS. DAVIS:** Yes, your Honor. And they don't object  
23 to valid charges. What they object to is not getting paid.  
24 And what they have concerns about are the other two breaches  
25 that I'd like to talk about.

1           We had on October 6th, 2005, an increase of the loan  
2 balance without the consent of the direct lenders, which is  
3 required under the loan servicing agreement. On March 6th,  
4 2006, we had another increase of a loan amount with the consent  
5 or knowledge of the direct lenders. That also is a violation  
6 of the loan servicing agreement. Now we're up to \$2,425,000.

7           There is a reference in the deed of trust that says  
8 the maximum amount that could be secured by the deed of trust  
9 is \$2,550,000. However, the loan agreement says further  
10 advances under 3.2 and three point -- 3.1 and 3.2 -- the loan  
11 amounts that -- under 3.1 is the \$2.1 million amount that was  
12 originally in the note. Under 3.2 it says that any increase of  
13 the principal amount would be discretionary and voluntary, not  
14 mandatory. However, Mr. Allison's declaration -- to which I  
15 filed my objection and motion to strike, which I hope your  
16 Honor did receive this morning -- and his motion that's set for  
17 June 21st seem to make an effort to fund the balance of  
18 \$125,000 that he somehow thinks is due and payable to this  
19 borrower under the loan documents, in violation of the language  
20 of the loan agreement. We have an even more serious problem  
21 with that, your Honor.

22           Exhibit K to my submission is the Nevada Lending  
23 Institution Commissioner Bice's May 1st, 2006, order that  
24 conditions USA Mortgage's license to broker loans to loans only  
25 funded by institutional lenders. Now, that limitation doesn't

1 include funding a loan from your operating cash for \$125,000.  
2 Mr. Bice is present here in the courtroom, and he will stand up  
3 and tell your Honor, if you choose to ask him, that that loan  
4 is in violation of their license. They cannot do it under the  
5 regulations that govern their license. However, the proposed  
6 new loan servicing agreement -- the proposed new loan servicing  
7 agent -- I'm sorry, your Honor; it's been a long week -- can  
8 broker that loan. They have no similar limitations on their  
9 license to broker loans.

10 Let's talk about the loan servicing fee for a moment.  
11 The loan servicing agreement that was entered into between  
12 Scott Canepa and USA Commercial provides for a loan servicing  
13 fee not to exceed one percent. Mr. Allison's declarations have  
14 provided agreements that indicate that the "not exceeding"  
15 language goes up to three percent. So, there is potentially a  
16 maximum of between one and three percent of a loan servicing  
17 fee. But specific to the Boise-Gowan loan here, what has, in  
18 fact, been charged is a half a percent. The note rate is 12  
19 and a half percent. The return on investment to the direct  
20 lenders is 12 percent. USA Commercial has, in fact, been only  
21 taking that half a percent. That works out to \$12,125 a year,  
22 slightly over a thousand dollars and ten per month. We're  
23 fighting over \$2,020 for loan servicing fees from July and  
24 August. With the blended rate of the lawyers in this  
25 courtroom, I don't think that would even buy you a minute of

1 legal services. That is how insignificant the impact is on the  
2 estate.

3 Now, these calculations and the representations that  
4 were made by Mr. Allison with respect to his ability to fund  
5 the \$125,000 loan lead me to believe that maybe the  
6 calculations under the budget on loan servicing fees, which are  
7 projected out for 13 weeks to be about \$1.2 million, might be  
8 wrong. Maybe they're just looking at the agreements and  
9 calculating what they might be entitled to. But you've got to  
10 remember when the loan servicing agreement was signed. It was  
11 signed at the very beginning of the relationship -- does your  
12 Honor need to take a break?

13 **(Voices and whispers off the record)**

14 **THE COURT:** Oh. So, you need to dial back in.

15 **MS. UNIDENTIFIED:** Yes. If we get a break for a  
16 minute, I can do it.

17 **THE COURT:** Okay. Well, people apparently got  
18 disconnected from the phone system.

19 **MS. DAVIS:** Okay.

20 **THE COURT:** Uh --

21 **MS. DAVIS:** Did you want to take a break, your Honor?

22 **THE COURT:** Yeah. We'll need to --

23 **MS. DAVIS:** Or do you want to just hang loose for a  
24 minute?

25 **THE COURT:** Yeah. We might as well.

1                   **(Off record discussion regarding setting up conference**

2                   **THE COURT:** This company might not win the  
3 procurement award.

4                   **(Laughter)**

5                   Okay. I guess we're on again.

6                   **MS. DAVIS:** Are we back on?

7                   **THE COURT:** All right. Sorry. Go ahead, Ms. Davis.

8                   **MS. DAVIS:** Thank you, your Honor.

9                   During break Mr. LePome and Ms. Chubb gave me the  
10 benefit of some information that has been briefed by them in  
11 response to other motions that your Honor is going to hear.

12                  **THE COURT:** Well, and I think that kind of points out  
13 the slippery slope of this whole thing.

14                  **MS. DAVIS:** Well, not exactly --

15                  **THE COURT:** I now have no loans left.

16                  **MS. DAVIS:** No, no, no. That's not the issue they  
17 pointed out to me. What they --

18                  **(Laughter)**

19                  I am sure that you're shocked and surprised to hear  
20 that.

21                  No; on the recoupment issue. What they represented  
22 to me is contained in their briefs that will be addressed  
23 later -- and your Honor might want to hold the recoupment issue  
24 in reserve if you so choose -- is that the First, Second,  
25 Third, Fifth, Sixth, and Seventh and Tenth Circuits have held

1 that there is no right to recoupment.

2           **THE COURT:** I don't hear Ninth in there.

3           **MS. DAVIS:** That's because there is no Ninth Circuit  
4 opinion.

5           **THE COURT:** Oh, I think there is. I think Ninth  
6 Circuit has got a lot of issues on recoupment; all the Medicare  
7 issues.

8           **MS. DAVIS:** Um --

9           **THE COURT:** There was a whole bunch of BAP cases back  
10 in the seventies on recoupment.

11          **MS. DAVIS:** Okay.

12          **THE COURT:** I can't tell you what they said, quite  
13 frankly; I haven't thought about it. I know I was always  
14 amazed by it, but, yeah, there is a whole series of BAP cases  
15 on recoupment back in the late eighties, early nineties.

16          **MS. DAVIS:** Your Honor, I know that with respect to  
17 some of the other motions in this case I did look at setoff and  
18 recoupment; I just simply wasn't prepared to address them  
19 today.

20          **THE COURT:** Sure.

21          **MS. DAVIS:** To the extent that that is a critical  
22 component, I would like the opportunity to submit a  
23 supplemental brief.

24          **THE COURT:** Okay.

25          **MS. DAVIS:** However, to the extent that your Honor

1 might want to hear a little more on it before you rule on my  
2 motion, Mr. LePome and Ms. Chubb have represented to me that  
3 they have more to tell you on those issues.

4           **THE COURT:** Okay.

5           **MS. DAVIS:** I would simply go back to my original  
6 point, which is, your Honor, I think it's apples and oranges.  
7 I think that they have to perform their obligations under these  
8 agreements, that they're going to somehow seize the revenue  
9 that comes from them as servicing agreements as property of the  
10 estate. We have to focus on the fact that this supposedly  
11 billion-dollar loan portfolio, most of that money is not  
12 property of the estate, especially as it pertains to direct  
13 lenders. We're talking about only the loan servicing fees.  
14 And with specific reference to the Boise-Gowan loan, even  
15 though they might be entitled -- USA Commercial might be  
16 entitled to take a loan servicing fee between one and three  
17 percent, they have taken only a half a percent. The impact of  
18 this motion is \$2,020.

19           **THE COURT:** Well, I assume there is a no-waiver  
20 clause.

21           **MS. DAVIS:** I beg your pardon?

22           **THE COURT:** I assume there is a no-waiver clause.

23           **MS. DAVIS:** Well, your Honor, but we also have these  
24 competing fiduciary obligations. When you have an investment  
25 that you solicit out to individuals who are protected by Nevada

1 law, you give them a particular return on their investment,  
2 which in this investment is 12 percent --

3           **THE COURT:** How in the world can you guarantee a  
4 return on your investment when the loan rate is different?

5           **MS. DAVIS:** Because the difference is their fee.  
6 They have a 12 and a half percent loan. They tell the  
7 investors they're going to get 12 percent. The math, half a  
8 percent, is their fee.

9           **THE COURT:** But how can you -- how can you guarantee  
10 them -- I mean, that's --

11           **MS. DAVIS:** Well, and --

12           **THE COURT:** That's the whole problem. You can't  
13 guarantee investors a rate of return.

14           **MS. DAVIS:** -- perhaps that's a poor choice of words,  
15 your Honor, but certainly the promissory note rate is 12  
16 percent, and -- excuse me -- is 12 and a half percent, and the  
17 arrangement with the direct lenders was that they would receive  
18 12 percent of that amount and that a half a percent of it would  
19 be used for the loan servicing fee.

20           **THE COURT:** Okay.

21           **MS. DAVIS:** Mr. Canepa's declaration demonstrates  
22 factual issues and concerns which are really more in the nature  
23 of business decisions or what you might call the business  
24 judgment of a direct lender and why this loan should be moved  
25 to a new loan servicing agent. I'm just going to summarize a

1 few of them.

2 I have mentioned the two pre-petition breaches in  
3 increasing the loan amount. I've mentioned Mr. Allison's  
4 current motion to try and fund \$125,000, which appears to be an  
5 effort to do so post-petition, and Mr. Bice's statement is, is  
6 that that can't be done under the current limits on their loan  
7 broker's license. We have concerns that USA's current  
8 management can't move quickly enough to foreclose and realize  
9 upon the collateral. Statements and schedules are being filed  
10 now. It's taken a long time just to get that done.

11 We also have the concern that USA Management might  
12 extend the loan maturity, which would also be in violation of a  
13 loan servicing agreement. There is a very real concern that  
14 the direct lenders of Boise-Gowan will become involuntary  
15 lenders to the bankruptcy estate by a charge back, surcharge,  
16 or other method. That was certainly tiptoed around on the  
17 Hillco (phonetic) motion and, quote, "reserved for another  
18 day," close quote, as to whether or not there would be a  
19 surcharge or a charge back.

20 From the perspective of direct lenders, they're  
21 getting more and more entranced in the bankruptcy proceedings  
22 at very significant cost. The proposed new loan servicing  
23 agreement would not have any of these problems, limitations,  
24 issues, concerns.

25 This loan has the personal guarantee of Tom Hantges

1 and Joe Milanowski. The direct lenders would prefer to move  
2 this loan to a non-debtor-in-possession loan servicing agent  
3 for these reasons.

4 Finally, because of the fact that USA Commercial's  
5 broker's license is limited to just institutional loans, they  
6 can't broker any additional advance even if it's needed.

7 **THE COURT:** Well, what are you going to tell your  
8 clients who have non-performing loans; that USA Commercial  
9 can't go ahead and foreclose on their non-performing loans,  
10 your other clients, because there is no money left because all  
11 the good investors have gone off and found other servicing  
12 companies.

13 **MS. DAVIS:** Your Honor, first of all, that is --

14 **THE COURT:** You're just trying to starve -- you're  
15 trying to starve the debtor.

16 **MS. DAVIS:** I am not; with all due respect, I am not.

17 Let's talk about starvation. Two thousand twenty  
18 dollars from this loan.

19 **THE COURT:** Why is your loan any different than  
20 Ms. Chubb's or anybody else's?

21 **MS. DAVIS:** I can't speak to the merits of  
22 Ms. Chubb's.

23 **THE COURT:** And the point is --

24 **MS. DAVIS:** I've found my hands full with my own.

25 **THE COURT:** -- how could I differentiate?

1                   **MS. DAVIS:** But that's the point. They are separate  
2 loans; they are separate borrowers; they are separate  
3 transactions.

4                   **THE COURT:** But that means all the good loans go out  
5 and all those people who aren't performing, your other clients  
6 who have non-performing loans, they are left with a debtor who  
7 can't perform on the agreement anymore because there's no  
8 assets to go out and foreclose.

9                   **MS. DAVIS:** Let's talk about this for a moment, your  
10 Honor. Your argument assumes that if they got foreclosed  
11 they'd get title to the property and they get to keep the  
12 property. They don't.

13                  **THE COURT:** No, no, no, no. It does not at all. My  
14 point is: If there's no monies coming in from performing loans  
15 because they have all -- lift stay has been lifted, and now  
16 it's time to go foreclose on the non-performing, they're going  
17 to have to -- because they have no monies left in the estate --  
18 they're going to have to go in and immediately assess every one  
19 of those borrowers to say, "Pony up some money so -- because we  
20 can foreclose, because we have no servicing fees left."

21                  **MS. DAVIS:** Your Honor --

22                  **THE COURT:** Right?

23                  **MS. DAVIS:** No. I respectfully disagree. That is  
24 the slippery slope argument that Mr. Allison would like you to  
25 believe.

1                   **THE COURT:** Why isn't that true?

2                   **MS. DAVIS:** Because when you look at the specific  
3 facts, they are different. The specific facts of this case are  
4 very different.

5                   **THE COURT:** I understand, but if I allow your loan to  
6 go because it's performing, that's your argument, my loan is  
7 performing, let me go.

8                   **MS. DAVIS:** No, that's not my argument, with all due  
9 respect. My argument is there have been breaches prepetition  
10 on this Loan Servicing Agreement and post-petition.

11                  **THE COURT:** Right. So that's true of every loan in  
12 this portfolio --

13                  **MS. DAVIS:** Right --

14                  **THE COURT:** -- right?

15                  **MS. DAVIS:** -- but what --

16                  **THE COURT:** That means that nobody, every loan should  
17 go out, and that means that those people who are stuck with  
18 nonperforming loans, there are no assets left to cover their  
19 loans back, because the one or two big loans or the ten big  
20 loans, you're out of here.

21                  **MS. DAVIS:** With all due respect, your Honor, the fly  
22 in that argument is the assumption that this \$2,020 is somehow  
23 going to be --

24                  **THE COURT:** It's not your 2,020, it's the 50 other  
25 ones. There is no legal --

1           **MS. DAVIS:** There aren't 50, okay? First of all, the  
2 only motion, the only loan before you --

3           **THE COURT:** So how could I --

4           **MS. DAVIS:** -- is Boise-Gowan.

5           **THE COURT:** So how could I not -- how could I grant  
6 your motion and not somebody else's arguably because you're  
7 one client and the one loan. But then you're telling me that I  
8 let the whole portion -- all of them go, even though they may  
9 have nonperformance.

10          **MS. DAVIS:** I don't mean to be argumentative with  
11 your Honor, but I do need to be --

12          **THE COURT:** And I appreciate the rhetorical  
13 questions.

14          Okay, let's go on. I'm sorry.

15          **MS. DAVIS:** And I do appreciate that you do  
16 appreciate that I'm an advocate for my client.

17          **THE COURT:** No, exactly. Exactly, I appreciate that.

18          **MS. DAVIS:** And basically where we are, your Honor,  
19 is from start to finish we disagree with the strategy and the  
20 analysis and the basis upon which the funds are being held. We  
21 believe that a deal is a deal is a deal and it should be  
22 enforced. The Loan Servicing Agreement has duties and  
23 obligations. It is really a trust agreement with respect to  
24 the collection and disbursement of money that belongs to other  
25 people and the collection of a small fee. This whole concept

1 that it somehow gets expanded to something larger than what it  
2 is something that we respectfully disagree with.

3                   What we are asking the Court to do is focus on the  
4 Boise-Gowan loan and the breaches that we have demonstrated to  
5 you and the business matter concerns that have been expressed  
6 by the lenders here. We believe that if you're going to  
7 recognize some set off recoupment or otherwise there needs to  
8 be something more before you than what's before you. I  
9 understand respectfully if you disagree.

10                  In conclusion, your Honor, we feel that based upon  
11 the case authority that's been cited that we have established a  
12 colorable claim to terminate this agreement and move the loan  
13 to a new loan servicing agreement.

14                  We have also received an opinion from  
15 Commissioner Bice (phonetic) that indicates that based upon the  
16 conduct in this case, pre and petition, and that's our Exhibit  
17 O, we are entitled to in fact terminate our agreement. Now, if  
18 we were in a non-bankruptcy outside context we would be able to  
19 do so and the Commissioner's office would be out there helping  
20 us terminate this Loan Servicing Agreement. But we're not.  
21 We're in bankruptcy. And because the Debtor has possession  
22 of --

23                  **THE COURT:** Unfortunately they weren't there before  
24 this case filed.

25                  (Laughter)

1           **MS. DAVIS:** I'll let Mr. Bice respond to that one.

2           **(Laughter)**

3           What we're asking you to do today is adopt Mr. Bice's  
4 opinion and grant our motion. Let my people go.

5           **THE COURT:** All right.

6           **MS. DAVIS:** Let them find a new servicing agreement,  
7 permit Mr. Canepa to exercise his right to terminate, recognize  
8 that, you know, nine other direct lenders have joined him and  
9 want to do so as well, that's 75 percent of the loan amount  
10 here, enter an order that facilitates the transfer of the loan  
11 documents, accounting records, and funds, because part of the  
12 funds are held by the PDG, and allow us to move on, get out of  
13 the bankruptcy case.

14           **THE COURT:** All right.

15           **MS. DAVIS:** Thank you, your Honor.

16           **THE COURT:** Okay, let's hear the other Motion for  
17 Relief From Stay and then have all the oppositions at once,  
18 since they're sort of the same kind of legal arguments, there's  
19 definitely different factual predicates, but --

20           So we've got Ms. Chubb.

21           **MS. CHUBB:** Thank you, your Honor.

22           I'm not going to do the usual presentation on stay  
23 relief because you've outlined the issues that are concerning  
24 you.

25           **THE COURT:** On your loans, at least I didn't have

1 before and I don't know if you've supplemented and if you have  
2 I missed it, are all of the entities for which you seek relief  
3 from stay, are they all in performing loans?

4           **MS. CHUBB:** No.

5           **THE COURT:** No, they're not. Okay.

6           **MS. CHUBB:** Absolutely not. No. And I'm not  
7 premising the stay relief on the fact that they are performing,  
8 because I think the principle goes to both performing and  
9 nonperforming loans and I have clients here with nonperforming  
10 loans that want to get them out of here so the estate isn't  
11 going to be stuck with those. I can't tell you that every  
12 nonperforming loan would go out, but I can tell you that some  
13 of them would.

14           **THE COURT:** And with respect to each of these  
15 properties, are these lenders 51 percent of each of those  
16 loans?

17           **MS. CHUBB:** No, and we acknowledge that we don't have  
18 51 percent now, but it seems silly to go out and --

19           **THE COURT:** So than how can I even consider it?

20           **MS. CHUBB:** Well, you can say, and what we're trying  
21 to find out is, if we get to 51 percent then do we get to do  
22 it, because going out and getting the 50 percent is not an  
23 inexpensive proposition and if the Court is going to say now  
24 anyway I'd recommend they do not spend the money.

25           **THE COURT:** Well, why isn't it -- you're going out

1 and getting the 51 percent, why isn't it in the nature of  
2 almost like a disclosure statement and unlawful prepetition  
3 disclosures?

4           **MS. CHUBB:** I'm sorry, what?

5           **THE COURT:** Well, if you are going to solicit people  
6 for your lift stay --

7           **MS. CHUBB:** Right --

8           **THE COURT:** -- why isn't that in the nature of a  
9 disclosure violation?

10          **MS. CHUBB:** Well, if you're saying that's the chicken  
11 and the chicken has to come first, we'll do that. But we  
12 didn't know and I don't think it --

13          **THE COURT:** Okay.

14          **MS. CHUBB:** -- should have to come first. If the  
15 underlying allows 51 percent of people to get out, then we can  
16 get the 51 percent and we could bring that information to the  
17 Court. But to get the 51 percent first, and as has happened,  
18 and then you still can't get out means it was useless to get  
19 the 51 percent.

20          So we're here because we don't have the 51 percent  
21 and if you are going to let people out when they do have the  
22 51 percent we'll get it. But if you're not going to let  
23 anybody out there's no reason to get it.

24          So does that answer that question?

25          **THE COURT:** Uh-huh.

1                   **MS. CHUBB:** Okay. This is the way we see it: We  
2 acknowledge that we don't have the 51 percent. We know that  
3 the loans are in -- I mean the servicing agreements are being  
4 breached. And it's not just prepetition, because post-petition  
5 they're being breached also. And that somehow doesn't seem  
6 right. You know, once you get new management and you're in a  
7 Chapter 11 you should be conforming to the law.

8                   And if you look at NRS 645B.175 --

9                   **THE COURT:** Well, how do you -- especially in your  
10 case, you know, Ms. Davis is a little different. How in the  
11 world -- some of your clients have loans that are  
12 nonperforming --

13                  **MS. CHUBB:** Yes.

14                  **THE COURT:** -- how in the world -- and so other  
15 people have been -- and so they've been paid and they shouldn't  
16 have been, and other people probably are in the reverse  
17 situation --

18                  **MS. CHUBB:** No, everybody --

19                  **THE COURT:** -- they weren't paid.

20                  **MS. CHUBB:** Everybody was getting paid, your Honor.  
21 Everybody was getting paid.

22                  **THE COURT:** Well, okay, so some of the loans are  
23 nonperforming, some are performing --

24                  **MS. CHUBB:** Right.

25                  **THE COURT:** -- some are performing.

1           **MS. CHUBB:** Yes.

2           **THE COURT:** Okay. So on the performing loans your  
3 clients will -- well, even if they're nonperforming loans what  
4 if somebody hasn't paid in four years --

5           **MS. CHUBB:** What if somebody hadn't paid --

6           **THE COURT:** -- in one loan --

7           **MS. CHUBB:** What if somebody --

8           **THE COURT:** Wait, now listen.

9           **MS. CHUBB:** Okay.

10          **THE COURT:** You've got three sets of clients. What  
11 if one client, A, his loan hadn't been paid for four years,  
12 Client B's loan hadn't been paid for two months; the point is  
13 Client A has been way overpaid. Now how do you adjust that  
14 process?

15          **MS. CHUBB:** Well, the way you adjust that process is  
16 because we don't know exactly whose money it was that paid, but  
17 the Debtor made a lot of money and the Debtor may well have  
18 used its own money to pay, in which even the Debtor might  
19 want --

20          **THE COURT:** The Debtor has no right -- had no right  
21 to do that and no obligation to do that.

22          **MS. CHUBB:** Of course it didn't, but it did it.

23          **THE COURT:** But how would you do an adjustment?

24          **MS. CHUBB:** This is what --

25          **THE COURT:** What procedure would you use to do that

1 adjustment?

2           **MS. CHUBB:** This is the way I would do the  
3 adjustment: The adjustment would be start paying out on money  
4 that belongs to the lenders, because it doesn't belong and  
5 there's no creditor/debtor relationship between the Debtor  
6 here, USA --

7           **THE COURT:** All right.

8           **MS. CHUBB:** -- and people who have been overpaid.  
9 There may be a cause of action that would have to be brought by  
10 an adversary to collect money --

11          **THE COURT:** Who's going to bring it, with what money?

12          **MS. CHUBB:** Well --

13          **THE COURT:** The loan's gone. The estate has no  
14 interest in bringing an adversary anymore.

15          **MS. CHUBB:** Yes, they do.

16          **THE COURT:** No, they don't. The loan is gone.

17          **MS. CHUBB:** No, no. No, no. I'm saying if the --  
18 actually --

19          **THE COURT:** They're only the servicing agent. Why is  
20 that?

21          **MS. CHUBB:** Excuse me, you have a Debtor here who  
22 you're saying, I don't necessarily agree with this, but you're  
23 saying the Debtor may have paid out money to people when they  
24 weren't entitled to it --

25          **THE COURT:** Right.

1           **MS. CHUBB:** -- but that in fact was an advance to the  
2 borrowers. And I think --

3           **THE COURT:** Right.

4           **MS. CHUBB:** -- well I think maybe the Debtor is  
5 probably going to embrace that and try and get money from the  
6 borrower, because they advanced to the lender.

7           **THE COURT:** Then live with it.

8           **MS. CHUBB:** Why?

9           **THE COURT:** This is my analogy before --  
10           Couple in the front, please stop that.

11           **THE CLERK:** They're supposed to be on mute.

12           **THE COURT:** My same analogy, I'm a servicing agent  
13 for Countrywide.

14           **MS. CHUBB:** Yes.

15           **THE COURT:** Ms. Jarvis pays -- and you don't pay a  
16 dime for five years. Mr. Jarvis pays faithfully. I apply all  
17 the loans to your account.

18           **MS. CHUBB:** But we know that nobody's established  
19 that that's what happened and what you're not taking into  
20 account with that --

21           **THE COURT:** Well, how would do the adjustment?

22           **MS. CHUBB:** Okay, well, listen. You're saying there  
23 are only two payments that came in and one payment got applied  
24 to somebody else's account. But that's not probably what  
25 happened, although we don't have access to this information.

1 On \$900 million in loans there was \$100 million that  
2 belonged --

3           **THE COURT:** Then how would you do the adjustment?

4           **MS. CHUBB:** This is what I would do: You would --  
5 the money that was paid back to the lender would be kept by the  
6 lender. The borrower has not paid that money. The borrower  
7 still owes that money.

8           **THE COURT:** He paid it. The borrower made faithful  
9 payments. What, the borrower stopped paying.

10          **MS. CHUBB:** No. No -- yes, the borrower didn't make  
11 faithful payments.

12          **THE COURT:** Okay, so the borrower stopped paying.

13          **MS. CHUBB:** Yes, but the lender got paid.

14          **THE COURT:** But now the property is in foreclosure  
15 and it's been foreclosed.

16          **MS. CHUBB:** And --

17          **THE COURT:** How do you adjust your one client having  
18 got ten times what they would have gotten and the other person  
19 got nothing? No jurisdiction here --

20          **MS. CHUBB:** Wait, wait, wait.

21          **THE COURT:** -- so the loan is gone.

22          **MS. CHUBB:** Wait. If in fact the Debtor wants to sue  
23 because it doesn't get it back from the borrower the Debtor can  
24 sue.

25          **THE COURT:** No, ab initio (phonetic). The servicing

1 agreement's is gone.

2 **MS. CHUBB:** It can --

3 **THE COURT:** The stay is lifted, the servicing  
4 agreement is gone.

5 **MS. CHUBB:** No, if you're talking about unjust  
6 enrichment, it doesn't need the stay lifting.

7 **THE COURT:** Sure it does.

8 **MS. CHUBB:** No, it doesn't. Why does it?

9 **THE COURT:** Well, that's --

10 **MS. CHUBB:** You're saying there's been a wrong.

11 **THE COURT:** What's the nexus? It's (indiscernible)  
12 longer property of the estate.

13 **MS. CHUBB:** Wait. If in fact it was the Debtor's  
14 money --

15 **THE COURT:** Two claims inner se (phonetic).

16 **MS. CHUBB:** -- if in fact it was the Debtor's money  
17 and they voluntarily enriched somebody --

18 **THE COURT:** The Debtor's got --

19 **MS. CHUBB:** -- I'm sure the Debtor's counsel can find  
20 a way to do it. But I don't think that's what they're looking  
21 at. I think they're looking at --

22 **THE COURT:** So you -- and that's what you think would  
23 have to be done here?

24 **MS. CHUBB:** Yes, and it has to be done through an  
25 adversary. You can't just go around saying --

1                   **THE COURT:** Okay.

2                   **MS. CHUBB:** -- we have rights of set off when there  
3 are no rights of set off.

4                   **THE COURT:** So you've talked to all your clients to  
5 make sure that if I rule there's no jurisdiction once the  
6 loan's gone that's what they want to do if they were underpaid.

7                   **MS. CHUBB:** No, of course I haven't. You just raised  
8 that issue, so -- I mean I could turn around and talk to  
9 people.

10                  **THE COURT:** Well, that's something you've got to  
11 think about. We've been talking about this for three months  
12 now. If you're underpaid or overpaid, how do you do those  
13 adjustments inner se?

14                  **MS. CHUBB:** Well, you don't do it by keeping the  
15 money that you know belongs to somebody else and trying to  
16 offset it. You don't do it that way. This money clearly has  
17 to be paid out now and --

18                  **THE COURT:** You don't -- how many performing loans do  
19 you have, your clients have?

20                  **MS. CHUBB:** I don't know off the top of my head. I  
21 mean it doesn't matter, this is --

22                  **THE COURT:** So in the nonperforming loans your  
23 clients have no rights to any money right now, right?

24                  **MS. CHUBB:** They don't, but --

25                  **THE COURT:** So then why would you lift stay --

1           **MS. CHUBB:** -- this is a stay --

2           **THE COURT:** -- when you have no rights to any money?

3           **MS. CHUBB:** -- termination motion.

4           **THE COURT:** They have no rights to any money.

5           **MS. CHUBB:** This is a stay termination motion.

6 They --

7           **THE COURT:** If they have no rights to any money what  
8 is the basis for terminating the stay if they're loans are not  
9 performing?

10          **MS. CHUBB:** So they can go and control the loan. And  
11 if there's some basis for somebody getting money back from  
12 them, sue us.

13          **THE COURT:** Okay.

14          **MS. CHUBB:** I mean it's just -- I mean statutorily,  
15 the statute says except as otherwise provided in this section,  
16 and I don't see anything else in the section, the amount held  
17 in trust that is the amount collected from the borrowers must  
18 be released upon the deduction and payment of any fee or  
19 service charge due the mortgage broker --

20          **THE COURT:** Upon.

21          **MS. CHUBB:** Yes, they're taking the fees out.

22          **THE COURT:** But they haven't handled debtor fees.

23 The foreclosure fees, how about adjustments inner se?

24          **MS. CHUBB:** No, no. No, no. This is money that's  
25 paid in by the borrower and these are monies that are sitting

1 there that belong and must be paid --

2           **THE COURT:** You just told me a bunch of your loans  
3 are nonperforming. There is no money sitting there.

4           **MS. CHUBB:** On the monies that are sitting there we  
5 want them paid. This is the other motion, but, yeah, I'm happy  
6 to say that. Yes, we want monies that are --

7           **THE COURT:** But you don't know how many loans you  
8 have that are performing?

9           **MS. CHUBB:** It doesn't matter, your Honor.

10          **THE COURT:** Of course it does.

11          **MS. CHUBB:** No, it doesn't.

12          **THE COURT:** If there's no money sitting there what  
13 are they going to pay?

14          **MS. CHUBB:** They're not going to pay money that isn't  
15 sitting there. Pay the money that's sitting there. On the  
16 loans where they've collected money, pay the money out. That's  
17 the motion to pay. Pay it out now because the statute says if  
18 you took the services fees out you have to pay the money to the  
19 lender. That's the rule. And it's now being violated post-  
20 petition. It's different from the stay relief, but they are  
21 intertwined.

22          **THE COURT:** Again, do all of your clients realize  
23 that if that's the case there's no -- that you can't do  
24 adjustments? After the money is paid out you're going to have  
25 to sue them to get the adjustment.

1           Once the money is paid out you're going to have to  
2 sue those people to get the money back, right?

3           **MS. CHUBB:** Sue the -- who has to sue? The Debtor?

4           **THE COURT:** Somebody.

5           **MS. CHUBB:** Well --

6           **THE COURT:** So you would rather, all of your clients  
7 say I would rather be paid now and sue tomorrow?

8           **MS. CHUBB:** Yes.

9           **THE COURT:** Than doing a recoupment?

10          **MS. CHUBB:** Yeah. Take the money and run, yeah.

11          **THE COURT:** And your clients who are underpaid want  
12 you to say don't let them do an adjustment so I get even; I  
13 want the estate to spend money to sue them?

14          **MS. CHUBB:** That was just --

15          **THE COURT:** All your clients are saying that?

16          **MS. CHUBB:** I can't tell you all my clients are  
17 saying that. I'm saying there's a principle of law here  
18 involved and the borrower got advances and if the Debtor didn't  
19 use its own money or did use its own money and wants some  
20 overpayments, fine, figure out a legal theory and sue on that,  
21 but don't hold up -- you know if there were no funds this  
22 wouldn't be an issue, because what's happening is the direct  
23 lender funds and fees are being used so the Debtor can  
24 reorganize --

25          **THE COURT:** No, as I understand it the monies coming

1 in are not being -- they're being held separately. They are  
2 not being used.

3 **MS. CHUBB:** Not the fees, it's only --

4 **THE COURT:** That's right, the fees --

5 **MS. CHUBB:** -- you could never use that money.

6 **THE COURT:** -- the fees, I want to be sure, are you  
7 saying the fees are paid to the borrowers?

8 **MS. CHUBB:** No.

9 **THE COURT:** Okay.

10 **MS. CHUBB:** I'm saying that the money that belongs to  
11 the lenders can't be used --

12 **THE COURT:** Right, and then --

13 **MS. CHUBB:** -- for any reason except to pay the  
14 lenders, so pay them.

15 **THE COURT:** And it's not being used right now.

16 **MS. CHUBB:** I know --

17 **THE COURT:** No, it isn't.

18 **MS. CHUBB:** -- I want it to be used to pay the people  
19 it belongs to because --

20 **THE COURT:** Without any offsets or recoupments or any  
21 adjustments if --

22 **MS. CHUBB:** That's right.

23 **THE COURT:** -- somebody is overpaid.

24 **MS. CHUBB:** That's right.

25 **THE COURT:** And you want them to go be sued,

1 including your client. You want Client A to sue Client B.

2 **MS. CHUBB:** No, I don't know. I mean if somebody got  
3 money --

4 **THE COURT:** Your position is that Client A could sue  
5 Client B, right?

6 **MS. CHUBB:** No, I don't have to take that position.

7 **THE COURT:** How --

8 **MS. CHUBB:** Somebody else can figure that out. I'm  
9 not going to say my clients are suing each other and should be,  
10 no.

11 **THE COURT:** But they could be, right?

12 **MS. CHUBB:** They could be. Or the Debtor could sue  
13 people. It's just that this money, according to the statute,  
14 has to be paid out and has to be paid out --

15 **THE COURT:** So what is the problem with --

16 **MS. CHUBB:** -- when it's been received by the Debtor.

17 **THE COURT:** What is the problem with waiting till  
18 like for example August 1st?

19 **MS. CHUBB:** Well, let me address that, as long as  
20 we're on that topic. I have a motion to pay on calendar. I  
21 understand that the Debtor, based on Mr. Allison's supplemental  
22 declaration, is going to file a motion to pay. Well, let's  
23 just use mine. We don't have to go through another month of  
24 briefing and oppositions and every Committee weighing in.

25 **THE COURT:** Well, you apparently are unwilling to

1 agree on a date that they be paid, the parties weren't.

2           **MS. CHUBB:** What?

3           **THE COURT:** If they were going to file a motion to  
4 pay on July 25th and you want to proceed today --

5           **MS. CHUBB:** I'm saying you don't need another motion,  
6 you don't need all that briefing. Say they're going to pay if  
7 they have something --

8           **THE COURT:** But you all could agree to a date.

9           **MS. CHUBB:** To pay?

10          **THE COURT:** Yeah.

11          **MS. CHUBB:** Pay funds on the 25th.

12          **THE COURT:** But you apparently haven't talked about  
13 it.

14          **MS. CHUBB:** I've tried. And maybe they'll agree to  
15 it. I don't know.

16          **THE COURT:** You've spent three hours here and you  
17 guys haven't even talked about what date --

18          **MS. CHUBB:** We have --

19          **THE COURT:** All of you.

20          **MS. CHUBB:** -- Ms. Jarvis and I have been talking and  
21 we -- and I talked about just using our motion and her  
22 expressing her concerns.

23          **THE COURT:** Well, let's take ten minutes and we'll  
24 talk about it, you guys --

25          **MS. CHUBB:** Okay --

1           **THE COURT:** -- this is nonsense.

2           **MS. CHUBB:** -- great.

3           **MS. JARVIS:** We did talk about it and we intend to  
4 pay immediately after July 25th, after we get the motion on.  
5 The reason why there's a motion to pay right now, but as your  
6 Honor points out it's very complicated about who gets paid what  
7 and if we say grant the motion to pay, pay what? We need to  
8 set out what we figured out between, you know, who got paid  
9 when and, you know, prepetition overpaid, who needs to be paid  
10 what, that schedule is what we've worked on and which we will  
11 be prepared --

12           **THE COURT:** But you haven't even talked to them about  
13 it yet, that schedule?

14           **MS. JARVIS:** Well, we don't have it yet.

15           **MS. CHUBB:** They don't have it yet.

16           **MS. JARVIS:** We finished the initial --

17           **MS. CHUBB:** But there's an easy way to do this. My  
18 motion to pay stays on calendar. They file whatever it is  
19 they'd be filing in support of their motion as a response to my  
20 motion. We get that in ten days or so. And then everybody has  
21 a chance to look at this instead of having this frantic  
22 briefing schedule where they bring out a new motion and  
23 everybody has to reply to it. Let's just move forward. We  
24 need to get it resolved. And it's going to go out even longer  
25 if we have a separate motion. We should stay with this motion

1 and we'll see what they have to say and we'll come back here on  
2 the 25th and you can decide --

3           **THE COURT:** Of July you mean.

4           **MS. CHUBB:** Yes, of July. And we'll decide who to  
5 pay. But we're not going to start from scratch. I mean we  
6 just don't need another motion to pay. We have a motion to  
7 withhold payment and a motion to pay and now we're going to get  
8 another motion to pay. That's silliness.

9           **THE COURT:** Okay. All right, any other on the lift  
10 stays?

11           **MS. CHUBB:** Is there any way you can be persuaded on  
12 this issue? I mean....

13           **(Laughter)**

14           Because I've tried pretty much everything and I'm not  
15 making any progress here. So if you -- I mean if you've got  
16 any hint I could have about --

17           **THE COURT:** Let's hear from Mr. LePome.

18           **MS. CHUBB:** All right.

19           **MR. LePOME:** Thank you, your Honor.

20           The Courts generally give debtors' counsel a great  
21 deal of deference during the initial 120 days and I know that  
22 the Courts listen very carefully to debtor's counsels'  
23 positions and their paperwork. Mr. Schwartzer and I both have  
24 gray hair. We both have beards. If we can just ask for the  
25 Court's attention as though it were Debtor's counsel making the

1 proposal.

2           **THE COURT:** I resent that, Mr. LePome.

3           **MR. LePOME:** Oh, I'm sorry, your Honor. All right, I  
4 take that back.

5           **THE COURT:** I listen to all of you very carefully and  
6 you know that.

7           **MR. LePOME:** All right, then this is the most  
8 important thing I'm going to say today. My briefing is in  
9 Document Number 281, which you have a copy of. I have another  
10 copy if you didn't get a courtesy copy. And it's extremely  
11 clear.

12           We go through the Builder's case, which is  
13 Mr. Schwartzer's case that he seeks reliance on. I went  
14 through it in my brief word for word, paragraph for paragraph,  
15 sentence by sentence. And then we reached one problem, and  
16 that is the Debtor has an obligation to recoup money from the  
17 people who were paid on nonperforming loans. No case is cited.  
18 That's the only thing, the only proposition for which no cases  
19 were cited.

20           I did some research. The law starts on Page 9 of my  
21 brief and it cites Chase Manhattan v. Burton (phonetic).  
22 Escrow agent paid from its own account prior mortgages on  
23 company properties secured to mortgage refinance loans  
24 purchased by the lender on secondary mortgage market. They  
25 sued the lender for unjust enrichment.

1                   Your Honor, in this particular case, which was Chase  
2 Manhattan Bank, Burton was really a limited partner and he  
3 asked his bank to pay the limited partner what the limited  
4 partner was entitled to. His trust account received money from  
5 the general partner. The general partner's check bounced. He  
6 wanted reimbursement. He wanted recoupment. The District of  
7 Columbia Appellate Court looked at this very carefully. They  
8 cited the Seventh Circuit case in Hayden v. Stone (phonetic),  
9 and that's in my -- that's in the case itself:  
10 "The voluntary nature of the transfer and its having been made  
11 in the normal course of business indicates there's been no  
12 conversion, there's not right for recoupment."

13                   And then they looked at it and said:

14                   "This Court, this insured, like the Hayden Stone  
15 case, does not involve the unlawful control of the  
16 transfer used of someone else's property. Our  
17 conclusion is consistent with the holdings of other  
18 Courts that no conversion occurs when a transferee  
19 takes property to which he is entitled."

20                   And here's where we have to take a careful look. The  
21 people who were paid on nonperforming loans were entitled to  
22 those payments.

23                   **THE COURT:** Why?

24                   **MR. LePOME:** Let me tell you why they were entitled  
25 to those payments. Because they were the payee on the notes

1 they were entitled to those payments.

2           **THE COURT:** Wait a minute. If the borrower didn't  
3 make any payments on the loan --

4           **MR. LePOME:** Correct, they were nevertheless entitled  
5 to those payments.

6           **THE COURT:** No, because no payments were made. You  
7 were using Joe Blow's money to pay it.

8           **MR. LePOME:** Your Honor, that is exactly what  
9 happened here.

10          **THE COURT:** Tell me exactly -- wait a minute.

11          **MR. LePOME:** What happened was --

12          **THE COURT:** Wait a minute, if I'm the borrower --

13          **MR. LePOME:** -- Mr. Greenwald (phonetic) used his  
14 money to pay it from his own trust account. This attorney was  
15 denied the right to seek reimbursement.

16          **THE COURT:** But you just told me the borrower had the  
17 right to the payment. He didn't --

18          **MR. LePOME:** Under the note --

19          **THE COURT:** -- if the borrower is not performing --

20          **MR. LePOME:** No, that's the point. The obligation to  
21 make the payment, the right to receive it has nothing to do  
22 with whether the loan was actually performing or not. It's a  
23 right.

24          **THE COURT:** Well, that's just says Ponzi scheme with  
25 a giant "P."

1           **MR. LePOME:** No, it isn't. I understand --

2           **THE COURT:** How could it not be?

3           **MR. LePOME:** I have another case too exactly the same  
4 way the Judge ruled --

5           **THE COURT:** But that's why the finding is different,  
6 because it was his money. This is like loans -- that's the  
7 whole point, when the money -- in fact all of these cases,  
8 where the money comes in and they're using somebody else's  
9 money to make the payments.

10          **MR. LePOME:** That's what happened. Mr. Greenwald  
11 used his money to make the payments and now he wants recoupment  
12 and the Court says it would first appear that he's entitled to  
13 it. But then after they examined every statement, they  
14 examined all the other Circuits, they come up with an  
15 interesting situation, just as though --

16          **THE COURT:** But we don't know that it was USA  
17 Commercial's money. It could well have been the money from  
18 your other client's loan that came in --

19          **MR. LePOME:** Your Honor --

20          **THE COURT:** -- and was paid and that money was used  
21 to pay your other client and then when the next guy's loan came  
22 in it was used to pay that person's loan in typical Ponzi  
23 fashion.

24          **MR. LePOME:** Your Honor, I have to respectfully  
25 disagree because the focus of the Court obviously is towards

1 equality and fairness. And those are laudable qualities in  
2 every Bankruptcy Court and they have lot of equitable power.  
3 But we have --

4           **THE COURT:** Every one of your clients have loans that  
5 were performing all the way along?

6           **MR. LePOME:** No. And they have hired me to say put  
7 those loan performers -- the nonperforming ones out of  
8 Bankruptcy Court jurisdiction, we're going to foreclose, we'll  
9 order our own appraisals, and we'll see where we are.

10           **THE COURT:** And they don't care about adjustment if  
11 the other client was paid too much.

12           **MR. LePOME:** They don't care at all.

13           **THE COURT:** They don't want to be --

14           **MR. LePOME:** Because there is not a right to  
15 adjustment, and you won't let me finish.

16           **THE COURT:** Okay, I'm sorry.

17           **MR. LePOME:** If my son owes Chase Manhattan Bank and  
18 I make the payment, Chase Manhattan Bank when I sue because I  
19 made a mispayment because they both have the same name is going  
20 to say no, we had a right to the payment. No, they had a right  
21 to collect from my son. Guess what, Chase Manhattan Bank wins.  
22 And that's the second case. Decisions on both sides of these  
23 cases, and I'll go to the second case in a minute.

24           The first case again, which is Chase Manhattan v.  
25 Burton, says, and here's what the Court says:

1 "In situations of endless variety (endless variety) Courts have  
2 denied restitution because money paid by one party was received  
3 in good faith by the other in satisfaction of or as security  
4 for a valid claim against a third person."

5           **THE COURT:** So you're saying your clients that  
6 received money -- didn't receive money because somebody else  
7 was paid have no remedy.

8           **MR. LePOME:** I'm not saying they have no remedy.

9           **THE COURT:** Isn't that what you just told me?

10          **MR. LePOME:** Excuse me a moment, state that again.

11          **THE COURT:** The clients that were underpaid because  
12 somebody else got the money, they're without a remedy.

13          **MR. LePOME:** Oh, no, they certainly have a remedy.

14 The person who signed the promissory note owes them the money.

15          **THE COURT:** But what if the property has been  
16 foreclosed and it's undervalued? What if the property is only  
17 worth a million and it's a five million loan?

18          **MR. LePOME:** That's what they contracted for. They  
19 contracted as a loan secured by this property, it will have to  
20 be satisfied out of the property. If it was a nonperforming  
21 loan that someone else got, that doesn't affect their rights as  
22 regard to their note and their collateral. Does it? Of course  
23 not.

24          **THE COURT:** But what if, you know, the property --  
25 what if the property has declined in value? It was worth a

1 million five, there was 500,000 made in payments a year ago --  
2 there was \$500,000 made in payments, okay, and it was a  
3 \$5 million loan. They didn't get the 500,000 because somebody  
4 else got it. They stopped payment with 500,000 reserves. The  
5 property is now worth a million. They're short money and  
6 they've got no recourse to get it back from the person who  
7 received their money where the property had been actually  
8 foreclosed on. We've got some cases where the property is  
9 gone.

10           **MR. LePOME:** The person who received their money  
11 received it from a third party. They were entitled, however,  
12 to receive it under their note. It's not an unlawful receipt.  
13 They got the money in good faith. Those people who were  
14 improperly paid, here's the point, have a right to keep it as  
15 between the Debtor in this case --

16           **THE COURT:** Okay --

17           **MR. LePOME:** -- and themselves.

18           **THE COURT:** -- so your clients that were underpaid  
19 have no remedy against a party that was overpaid.

20           **MR. LePOME:** Oh, of course we don't. We only have  
21 remedies --

22           **THE COURT:** Do your clients all know that's their  
23 position?

24           **MR. LePOME:** Absolutely. I sent them a letter --

25           **THE COURT:** Okay.

1                   **MR. LePOME:** -- dated the 6th of June and when I was  
2 first hired we sent -- I sent out a four-page letter on all of  
3 the possibilities and yes, they do know that, and I'll provide  
4 a copy, of course --

5                   **THE COURT:** No, that's fine --

6                   **MR. LePOME:** -- there's an attorney-client privilege  
7 here.

8                   **THE COURT:** -- I'm just concerned, you know, it's --

9                   **MR. LePOME:** But I have to get a waiver of the  
10 attorney-client privilege.

11                  **THE COURT:** -- this case has a real problem, who's ox  
12 is getting gored. And I'm a little concerned because a lot of  
13 attorneys are representing a lot of different people and just  
14 for the very problems with the various interests, I'm just  
15 concerned that everybody knows that what they're attorney says  
16 today may not necessarily be in their best interests. And if  
17 you're fully aware of that, that's fine. And I'm not saying  
18 you, I'm just saying that's --

19                  **MR. LePOME:** Yes, I am fully aware of that,  
20 your Honor.

21                  **THE COURT:** -- the problem with multiple  
22 representation in a case with all the variables we've got. And  
23 I'm not suggesting --

24                  **MR. LePOME:** We're very --

25                  **THE COURT:** -- anybody's proceeding in bad faith. I

1 know you're all doing the best job you can.

2           **MR. LePOME:** Your Honor, let's take a look at the  
3 person who received the money, interest money, that he thought  
4 was from a performing loan but it turns out not to have been a  
5 performing loan. That's what you're focusing on.

6           **THE COURT:** Okay.

7           **MR. LePOME:** At 271 Fed Reporter, which is the  
8 second -- it's the same one, it's the Greenwald case. The  
9 first one was Chase Manhattan v. Burton and the second one is  
10 Greenwald v. Chase Manhattan. But take a look at this. Here's  
11 what the Court says:

12 "Although the Defendant (and the Defendant is the one who  
13 received the money) may have been seemed to have benefited from  
14 Plaintiff's mistake it was not enriched thereby and certainly  
15 not unjustly enriched."

16           The Court also said that the unjust enrichment claim  
17 was defective for lack of contractual and implied relationship  
18 that would lead to a duty to indemnify the Plaintiff.

19           Let me give you the facts in this Greenwald case.  
20 Chase received notes and other documents on March 22nd. On  
21 March 23rd and 24th the Greenwald firm received uncertified  
22 checks, pays on those mortgages. The Greenwald firm learns  
23 that the check is bad on the 28th of March, tries to stop the  
24 check to the prior mortgagee, but they already cleared.  
25 Greenwald wants to seek reimbursement.

1                   Just like we think the Debtor here has a right to go  
2 to those nonperforming loan holders who received money. They  
3 had a right to receive money and it doesn't matter whether the  
4 serial number on the dollar bill came from their lender. It  
5 could come from a third person. It doesn't matter. They have  
6 a right to receive the money. This is a difficult thing to  
7 fathom and Judge Reid (phonetic) had a very difficult time with  
8 it in Massachusetts.

9                   Incidentally --

10                  **THE COURT:** I guess -- I'm sorry, I've gone over it  
11 three times but I don't get it. If the loan is not paying,  
12 being paid, you're still saying they have the right to receive  
13 that money?

14                  **MR. LePOME:** That's what the law says in all eight  
15 Circuits that have examined this and there are none in the  
16 Ninth Circuit. And I have researched this as recently as  
17 yesterday. The Third Circuit came out in Blood (phonetic) in  
18 May of this year, citing these cases by the way.

19                  **THE COURT:** Okay. All right.

20                  **MR. LePOME:** One last thing, here's the test, and  
21 it's in (indiscernible) statement.

22                   "Where there's a real debt to the creditor (there is  
23 a real debt to the creditor) the person now seeking  
24 restitution chose to pay it off and the creditor got  
25 only what was due him. A close case perhaps, but the

1           close cases have to be decided one way or the other."

2           And they cite the Reid statement. And Judge Reid had

3 a difficult time, but all Circuit Judges on appeal approved

4 what she did. First she was going to do the opposite because

5 it doesn't seem intuitive that that should be the law. But

6 that is the law. And it protects those who receive money in

7 good faith from later having suits against them when they're

8 really owed money.

9           My clients who had nonperforming loans were owed

10 money. They got money. They are not in a position, nor does

11 the law allow them -- of course they're in a position to pay it

12 back, they're all millionaires. We did not (indiscernible) if

13 they weren't millionaires. Fifty have tried to hire me, 15

14 did.

15           So the bottom line is for those who received money on

16 nonperforming loans there is no cause of action against them in

17 any Circuit and any Judge that has ever examined this, and I've

18 gone back 25 years.

19           **THE COURT:** Okay. I'm going to -- I assume -- I'm

20 going to hear the pros and then I'll take a break and hear the

21 opposition.

22           **MR. GORDON:** Thank you, your Honor.

23           I've listened to the arguments presented and

24 obviously we represent the Direct Lenders. It reminds me of a

25 statement my wife has told me for the last 35 years at various

1 times, and that is remember the first rule of holes, if you're  
2 in a hole and you want to get out, stop digging. And with that  
3 I'll try to stop digging and put some perspective in this.

4 There really is -- this is -- what's going on right  
5 now with regard to these motions is really the other side of  
6 the coin from the motion to hold and there's really two issues  
7 that are before the Court right now. There are some factual  
8 statements I'd like to correct and make clear here. There's  
9 two real issues. One is the concept of the rejection and  
10 termination of executory contracts and there's also the concept  
11 of 362 relief from stay. And I think that in some ways it's  
12 captured best by the opposition filed to the Canepa motion by  
13 the Debtor. Because the Debtor says first Canepa has not shown  
14 that they are entitled to terminate the executory contracts,  
15 and number two, even if they do they're not entitled to relief  
16 from the stay, because they either haven't shown cause or  
17 they're adequately protected.

18 The Direct Lenders' position, the Committee's  
19 position, is very clear. I want to make it very succinct. We  
20 support the rights of Direct Lenders to terminate the service  
21 agreement and terminate the Debtor, USA Capital Mortgage, as a  
22 servicing agent as provided for in the servicing agreement. In  
23 essence, we support both the democratic process and as provided  
24 for in the services agreements and by Nevada law and  
25 regulations.

1                   **THE COURT:** So your clients want this case to be  
2 over.

3                   **MR. GORDON:** No. We want the ability of the Direct  
4 Lenders to enforce their rights under the servicing agreement.

5                   Now, the Court said performing versus nonperforming.  
6 I would submit that -- well, first of all I think the statement  
7 made two weeks ago, and I thought this was a sea change and  
8 where the Court is right now is not anything that we did not  
9 believe the Court would be, and that was when the Debtor got up  
10 and said sometime by July -- by June 15th we're going to file a  
11 statement showing due to/due froms up to the petition date and  
12 then sometime around July 1 we'll file it for a later date up  
13 through whatever date is the closest to that date post-  
14 petition. And obviously I don't anticipate we're going to see  
15 any due to/due from changes from the petition date to today. I  
16 just can't imagine that. And then we're going to file a motion  
17 which would come on on July 25th when the Court gets back. My  
18 statement was that sounds good, the devil's in the details.  
19 And I believe -- and where the Court's position is now is not a  
20 surprise to the Committee or to me.

21                   However, I'd like to clear up a couple things and put  
22 them out there, because some of the statements that have been  
23 made and some of the positions that the Court seems to be  
24 talking about or thinking about don't make a lot of logical  
25 sense to me.

1                 First, I would assume that the due to's, if you want  
2 to put it in this context, are most likely the performing loans  
3 because the performing loans produced income that would have  
4 been available. The nonperforming loans most likely have not  
5 produced income; that's why they're nonperforming. I would  
6 assume the primary source of the money that went to the -- that  
7 the due to's went to the due froms are most likely those four  
8 loans that were paid off and the properties reconveyed and the  
9 money never paid to those Direct Lenders. That would seem to  
10 be logical sense. How can the nonperforming be due funds.

11                 **THE COURT:** So you're going to dump the people who --

12                 **MR. GORDON:** No, I'm not saying that.

13                 **THE COURT:** -- in good faith made loans and were  
14 secured --

15                 **MR. GORDON:** I'm not saying that.

16                 **THE COURT:** -- because you're not -- you're going to  
17 say you're not going to represent them.

18                 **MR. GORDON:** I'm not saying that. Oh, those people?

19                 **THE COURT:** Yeah.

20                 **MR. GORDON:** Your Honor, they fit somewhere, those  
21 people who didn't get paid. The problem is is that, to be  
22 candid, and obviously the Court asked before, their interests  
23 are substantially different in that since they don't have  
24 collateral their source of repayment are two-fold; one, the  
25 Debtor, which violated the service agreement, violated state

1 law, violated both contractual and fiduciary duties to these  
2 people clearly, and I would submit they're the largest  
3 unsecured class; and they also most likely have a cause of  
4 action against those parties who received the money.

5           **THE COURT:** So how do you see this case going? The  
6 servicing agreements are all gone, this Court loses  
7 jurisdiction, and you're left to go fight it in State Court,  
8 and if you want to do that, I guess that's fine.

9           **MR. GORDON:** Your Honor, can I --

10          **THE COURT:** I mean that's where you're headed.

11          **MR. GORDON:** No.

12          **THE COURT:** How can you not be?

13          **MR. GORDON:** Your Honor, here's part of the  
14 problem --

15          **THE COURT:** If all the servicing agreements are gone  
16 what jurisdiction is there?

17          **MR. GORDON:** Here's part of the problem, to the  
18 extent that the -- USA Capital Mortgage is, was only a  
19 servicing company. No question. And by virtue of the order  
20 entered by the division, the mortgage division, they're only  
21 capable going forward of doing new loans with institutional  
22 lenders. And that may be where they wish to go. But by virtue  
23 of their prepetition actions they've created a large pool of  
24 liability. They're both primarily and secondarily liable for  
25 all these problems.

1           When we first got involved in this I thought about  
2 this case from the standpoint of what's the best mechanism to  
3 try to deal with these due to/due froms. Clearly these due  
4 froms -- or due to's have causes of action against the due  
5 froms in State Court. Thirty-six hundred or whatever number of  
6 lawsuits is nuts. It doesn't make sense. I've always  
7 considered that possibly the best mechanism, the best place to  
8 resolve that, if it can be brought into this, is this Court.

9           **THE COURT:** But how?.

10          **MR. GORDON:** I have also thought how to do it, given  
11 the limitations of American Hardwares (phonetic), given the  
12 limitations of Orchards (phonetic), how do we do it? We don't  
13 have the same type of expansive jurisdiction in the Ninth  
14 Circuit that we have elsewhere. I thought possibly obviously  
15 the loans with regard to the funds who are in bankruptcy give  
16 the Court some jurisdiction. I played with that. I don't  
17 know. I just know that I'm not here on behalf of the Direct  
18 Lenders Committee saying that anything other than we support  
19 the right under agreement to enforce your rights. And what I'm  
20 saying is I would expect --

21           **THE COURT:** So that means --

22          **MR. GORDON:** -- I would expect --

23           **THE COURT:** -- if all the contracts go, there are no  
24 funds left to pay you, there are no funds left to pay anybody  
25 else, and there's no funds to do any sort of relationship

1 between the parties. You understand that?

2 **MR. GORDON:** Your Honor, ultimately that may be the  
3 outcome. I don't think it is.

4 **THE COURT:** Why not?

5 **MR. GORDON:** I am trying -- your Honor, that's --

6 **THE COURT:** How do I let one go and not everybody  
7 else?

8 **MR. GORDON:** May I just complete, because I'm not  
9 trying to get to that, nor am I prepared to say this is where  
10 we need to be. What we're addressing right now is executory  
11 contracts and 362, and the reverse side of that is holding the  
12 funds.

13 Let's just focus on -- and what I'm trying to say is  
14 I think the Court coming to the conclusion or the initial  
15 preliminary idea or conclusion that it's a performing versus  
16 nonperforming I think may be wrong. I think that the ones that  
17 are more troublesome are the nonperforming, because they're  
18 more likely to be the ones who owe money from -- who owe money.  
19 Number two, I would submit that in my years of experience the  
20 ones who are more likely to come before the Court to try to  
21 terminate their rights probably would be the nonperforming  
22 loans to the extent the lenders, borrowers, the lenders,  
23 because why are they nonperforming? What we know from the  
24 report and we know from Mr. Allison is prepetition it was  
25 hidden from these people. They were either extended without

1 their approvals or whatever happened, et cetera.

2           If I am them I may have faith and confidence in  
3 Mr. Allison and if he can establish that this is not the old  
4 Debtor. On the other hand, I think that my one action is  
5 probably to foreclose or to take that route or to try to  
6 reorganize --

7           **THE COURT:** And you then give up the rights to  
8 recover anything from somebody else that was overpaid.

9           **MR. GORDON:** No, I'm not saying that.

10          **THE COURT:** How would you do it?

11          **MR. GORDON:** What I'm saying is --

12          **THE COURT:** How would you do it?

13          **MR. GORDON:** Let me continue on and I'll tell you  
14 where we're going. I'm just trying to say to the Court it's  
15 not a simple answer. It's not a conclusion you can reach at  
16 this time with due to/due froms based on  
17 performing/nonperforming.

18          **THE COURT:** I know, but you are.

19          **MR. GORDON:** No, I'm not.

20          **THE COURT:** You're telling me these stays should be  
21 lifted.

22          **MR. GORDON:** No, what I'm saying is I did not say  
23 that.

24          **THE COURT:** That's the implication.

25          **MR. GORDON:** I did not say that.

1                   **THE COURT:** That's certainly the implication.

2                   **MR. GORDON:** May I go on?

3                   **THE COURT:** Where does it stop? I mean where -- what  
4 I mean is where -- you're saying you support the right to lift  
5 stay in all those, then I don't understand.

6                   **MR. GORDON:** No, I didn't say that. What I said was,  
7 let me repeat again, the Committee supports the right of those  
8 parties -- two issues before the Court. There's the issue of  
9 executory contracts and the issue of lift stay. The Debtors  
10 recognize those are two separate issues.

11                  **THE COURT:** Sure.

12                  **MR. GORDON:** We agree. We support the right that if  
13 51 percent come before this Court they should be entitled to  
14 terminate the executory contract if they establish the basis  
15 for that termination, give that notice, the servicing agent.  
16 Then the question comes down to, and I think where the Court  
17 is, is I have reports being filed today, I have reports being  
18 filed July 1, and I have a hearing July 25th at which this may  
19 all go away because there will be a motion we haven't seen, we  
20 don't know the standards in it, but they're going to seek to  
21 distribute funds.

22                  What I'm saying to the Court is is that we support  
23 the right and the Courts have recognized that as a matter of  
24 state law and as a matter of contractual law that if each  
25 direct loan obtains the necessary approval that they're

1 entitled to terminate their contract. Then the issue becomes  
2 what do I do in terms of lifting stay to let them do that. And  
3 what the Court is troubled with and groping with and what  
4 counsel has basically said is we wait until July 25th because  
5 the motions will be out and we expect to make distributions, I  
6 believe their last pleading yesterday said we want to make  
7 distributions by the end of July.

8                   What we do know is the following --

9                   **THE COURT:** So do all of the Committees support  
10 waiting for July 25th as far as lifting the stay?

11                  **MR. GORDON:** Ah, I didn't say we didn't.

12                  (**Laughter**)

13                  **THE COURT:** If I have spent three hours listening to  
14 all of you and you all agree --

15                  **MR. GORDON:** But if -- but, your Honor --

16                  **THE COURT:** -- that we can put this over to July 5th,  
17 I've had it.

18                  **MR. GORDON:** But, your Honor, I can't control what  
19 other parties say; I can only represent my committee, and I'm  
20 up here now and I'm trying to propose a solution that will get  
21 us to that answer, if I may.

22                  What is happening between now and then, and we keep  
23 talking about the Debtor, monies are being put aside. I don't  
24 have any problem with that. But it's not all being put aside.  
25 One of the things that's happening here is that servicing fees,

1 according to the latest budget filed which will be on calendar  
2 on the 21st that was filed I believe on -- the revised budget  
3 on June 9th, and it's for 13 weeks, from 6/4/2006 now to  
4 8/27/2006, contains a number of income items which trouble me.  
5 Those are going to be better addressed next week, but they do  
6 go to the effect of a statement the Court made that none of the  
7 monies are being touched. According to this budget as of the  
8 week ending 6/11/2006 there is \$64,586,700 in the investor fund  
9 account. As of the week ending 7/30/2006 they estimate there  
10 will be \$173,995,000. That will be money I assume that's going  
11 to be the subject of the motion for distribution.

12 I also note on this document that on the income side,  
13 and that is operating account for the Debtor, they anticipate  
14 receiving in service fees 311,000 for the week ending 6/11 and  
15 then continuing on through 7 -- another 8,000, 228,000, 122,  
16 286. Of special note to me is that they show on 7/2/2006 an  
17 interest income from the collections account of \$320,000. That  
18 320,000 appears to be money generated as interest on the  
19 investors fund.

20 My first question is, response to the Court, I don't  
21 know if the Court's statement was correct, assumption was  
22 correct, if none of the monies in the investors account, that's  
23 money being generated in the investor account, that's money  
24 that belongs to the investors.

25 I tried to figure out what the 320 represented and it

1 appears to be using a interest rate of 4.75 treasury, that  
2 appears to be a 30-day treasury on about a hundred million  
3 dollars.

4           **THE COURT:** But to be absolutely clear, you're not  
5 suggesting that any of the monies that came in are being used  
6 for any -- they're being put aside.

7           **MR. GORDON:** No, I'm suggesting --

8           **THE COURT:** Secondly --

9           **MR. GORDON:** -- I'm suggesting --

10          **THE COURT:** -- it's just the interest is all you're  
11 talking about.

12          **THE COURT:** They're saying that the interest earned  
13 on that is going from there --

14          **THE COURT:** Okay. Okay.

15          **MR. GORDON:** There is one other item that troubles I  
16 know us and the other funds, other Committees, and that is  
17 there's an item showing 6/11/2006 of collection of prepaid  
18 interest from borrowers of \$10,308,800, and then on 6/25  
19 another four million eight and then on 7/2 another one million  
20 one hundred and two thousand. We don't know what that is. We  
21 just don't know. Is that the money we're talking about  
22 collecting back? If it is, it's going into the account.

23          What we would propose on behalf of the Direct Lenders  
24 Committee is the following:

25          One, that we separate the two issues. That it is

1 both foolhardy and inappropriate to condone or to allow the  
2 Debtor, and I think this is foolhardy on the part of the Debtor  
3 to take the position that they're not going to honor or  
4 recognize, both pursuant to state law and the contract, that if  
5 51 percent join that they should not be able to seek or have  
6 the right to terminate the executory contract.

7           This Court doesn't have jurisdiction to violate  
8 Nevada law. My reading of the report from the mortgage -- or  
9 the order from the mortgage division basically says that this  
10 is what they did previously, I can't believe that the mortgage  
11 division would condone or say that you don't have to honor  
12 those rights.

13           I would rather focus on the 362. I look forward to  
14 the motion. I look forward to the reportings. I look forward  
15 to all that information becoming available so we can get a  
16 handle on it and we know where everyone stands.

17           What I would propose with specific regard to  
18 Mr. Canepa and everyone else with regard to this, that we  
19 condition a stay to the July 25th hearing and the provision of  
20 adequate protection. And that adequate protection is as  
21 follows:

22           One, that the investor account remain inviolate, that  
23 no 320 and no interest be taken out of that fund and be used  
24 for general operations of the Debtor.

25           Number two, that with regard to those loans which

1 have shown that they're entitled to terminate their document,  
2 that no action be taken until July 25th to either renegotiate,  
3 extend, seek pari passu loans, such as with the Boise loan,  
4 those issues, some of which are before the Court on the 21st.  
5 That would be inappropriate for those loans. If those people  
6 theoretically have the right of terminating right now, taking  
7 their loans elsewhere, to hold them over until July 25th, they  
8 should remain in the same position, they shouldn't be subject  
9 to further modifications, provisions, extensions, or anything  
10 else.

11           Third, I don't think that any of this, which we need  
12 to know, and none of this 60 million, or whatever, should be  
13 deemed to be property of the estate. There's this -- you said  
14 a slippery slope. The slippery slope is working two ways here.  
15 One is the Court's concerned that all these funds will -- all  
16 these lenders will jump ship, direct lenders get the  
17 51 percent, jump ship. I appreciate that. I don't think  
18 that's going to happen before July 25th.

19           And number two is it's also --

20           **THE COURT:** Well, let me make something absolutely  
21 clear. I have presumed on both these motions to lift stay, in  
22 light of the Debtor's opposition saying we're going to be ready  
23 to pay by July 25th that their position is heck no, we're not  
24 going to do that.

25           **MR. GORDON:** Well --

1                   **THE COURT:** So I have presumed that the lenders,  
2 those movants, are unwilling to negotiate and agree to a  
3 July 25th date.

4                   **MR. GORDON:** What I'm saying to the Court is --

5                   **THE COURT:** And so I'm just going to explain that in  
6 doing the arguments my questions to them are based upon the  
7 assumption they're saying no, we want it now, we don't care  
8 when, even if it's tomorrow, we're getting paid.

9                   **MR. GORDON:** And we're a committee which represents  
10 3600 of these people and we're trying to figure out the best  
11 way of getting there. And in light of what the Debtor said two  
12 weeks ago, to me at that moment and it still remains, I believe  
13 it remains to the Committee, that we hold inviolate the  
14 contractual right to terminate but we understand that the Court  
15 explored about could we fashion some type of relief and we  
16 think the relief, until we see the motion and until the Court  
17 gets documentation, until we -- that generally, given this  
18 overriding, overarching proposal that they're going to file  
19 this motion, that we remain everything in the status quo as it  
20 relates to these direct lenders, specifically as to Mr. Canepa,  
21 who is here with 51 percent.

22                  **THE COURT:** Well, and that's exactly why I was saying  
23 ten minutes ago when I was a little upset when I didn't think  
24 people had really talked to each other.

25                  **MR. GORDON:** So with that, your Honor, unless the

1 Court has any questions, but I think the key here is the  
2 adequate protection is provided -- and by the way, with  
3 Mr. Canepa, if an interest payment is being received, if he has  
4 the 51 percent, which he does, and an interest payment is being  
5 received and the Debtor is taking the service fees, clearly  
6 they're taking service fees, that at minimum they should make  
7 the interest payment to Mr. Canepa. What difference does it  
8 make to make a small interest payment on this or any of the  
9 loans theoretically over the next 30 days if there are such  
10 fees pooled and most of the loans have collateral, the loans in  
11 place. That goes to the whole motion. But we can save that  
12 for later on, because we'll address that, because I don't think  
13 the holding of all the funds is appropriate either. But we  
14 don't know because we don't know what the funds relate to,  
15 which loans, and that's a matter that we won't know for another  
16 couple week.

17           **THE COURT:** Okay. All right, well, let's recess and  
18 then I'll hear opposition.

19           **THE CLERK:** All rise.

20           **(A recess was taken from 12:00 p.m. to 12:11 p.m.; parties**  
21 **present)**

22           **THE CLERK:** All rise. Bankruptcy Court is now in  
23 session.

24           **THE COURT:** Be seated. Okay, opposition.

25           **MS. JARVIS:** Your Honor, if it would please the

1 Court, we -- I know there's a pro se opponent and maybe she  
2 could go first --

3 **THE COURT:** Oh, okay.

4 **MS. JARVIS:** -- and then we'll follow.

5 **THE COURT:** All right.

6 **MS. CANGELOSI:** Your Honor, my name is Donna  
7 Cangelosi and I'm a direct lender. I'm going to first ask your  
8 indulgence because I'm not an attorney, I'm just a direct  
9 lender.

10 **THE COURT:** And you did file a written response,  
11 correct?

12 **MS. CANGELOSI:** Yes, Your Honor, I did. I filed a  
13 response to the motion.

14 **THE COURT:** Okay. Thank you.

15 **MS. CANGELOSI:** Your Honor, when we first started --  
16 or when USA Commercial Mortgage and its entities first went  
17 into bankruptcy, and before Mr. Landis had appointed  
18 committees, a constituency had gathered around and given me  
19 approximately \$150 million in proxies, requesting my being a  
20 committee representative. In addition to those proxies, they  
21 also gave us the investments for which they were participating  
22 in, and as a result we developed a database. And from that  
23 database of the \$150 million of investments, 125 million of  
24 those investors -- \$125 million of those investments were  
25 represented by direct investors. Less than one percent of

1 those direct investors had only one loan. Most of those direct  
2 investors had, indeed, more loans, and most of them had five on  
3 average.

4 I personally have 17 loans in -- as a direct lender.  
5 And of those 17 loans, I will give you the complexion. I have  
6 seven that are performing. I have two that have been paid pre-  
7 petition, so that would put me into the unsecured lender  
8 category on those loans. I have one that has been paid -- two  
9 that have been paid post-petition. And I have six that are  
10 non-performing. So I have a fairly comprehensive portfolio I  
11 represent actually every interest that could be represented by  
12 the direct --

13 **THE COURT:** And these are your personal loans?

14 **MS. CANGELOSI:** These are my personal loans.

15 **THE COURT:** Okay.

16 **MS. CANGELOSI:** Absolutely. Okay. So the point that  
17 I want to make is that Mr. Canepa, having only one loan,  
18 represents a unique entity within this bankruptcy. Most of the  
19 lenders -- the direct lenders have multiple loans, such as  
20 myself, I said with the average being five. Now we have a  
21 fairly comprehensive database of the \$150 million proxies that  
22 we have gathered. So that basically is that.

23 That being said, I want to also make a point that  
24 Mr. Canepa solicited myself, as well as other direct lenders,  
25 to sign on, if you will, to be part of the party to move the

1 loan to a loan servicing agreement -- another loan servicer.  
2 And those people who did agree, did so without the knowledge of  
3 what their account really looks like yet. They have not  
4 received their accounting statement on behalf of USA Commercial  
5 Mortgage. They don't know where they stand, you know, fully.  
6 They could probably have some assumptions, but until you  
7 actually --

8           **MS. DAVIS:** Excuse me, Your Honor.

9           **MS. CANGELOSI:** -- receive that information --

10          **MS. DAVIS:** I really hate to interrupt Ms. Cangelosi  
11 and object, but she can't be representing people. She's not a  
12 lawyer. She can't also be making statements based upon hearsay  
13 and her communications and her "proxies". She needs to argue  
14 her facts regarding her opposition.

15          **THE COURT:** That's true. You can only argue  
16 concerning your loan.

17          **MS. CANGELOSI:** Okay. Your Honor, I would not agree  
18 -- I'll put it in context for Ms. Davis? Okay. I would not  
19 agree, for example, to sign on with any sort of pulling out a  
20 loan or multiple loans, only because I have not had a full  
21 accounting of my own activity at this particular point in time.  
22 I don't know whether I owe money, I don't know whether I'm owed  
23 money, I don't know how my unsecured loan's going to be dealt  
24 with yet. So all I'm saying is, I have nothing -- I do not  
25 have sufficient information to make that decision at this point

1 in time.

2                 The -- a couple of other points I would like to make.  
3 Number one is that Milanowski and Hantges are involved in these  
4 loans. I am concerned over moving this loan -- this one loan.  
5 They're also involved, I understand in 42 loans. I'm concerned  
6 over moving this one loan and I'm concerned over it having --  
7 if foreclosure is required, I'm concerned over the new loan  
8 servicing agreement or the new loan servicer foreclosing on  
9 this in a fire sale and then looking towards the personal  
10 guarantees of Milanowski and Hantges. This may not necessarily  
11 be within the best interest of my particular portfolio.  
12 Perhaps more aggressive ways to monetize this loan would be  
13 better sought with not looking to tap into those personal  
14 guarantees and leaving that available for other more  
15 problematic type of activities.

16                 Another concern of mine is that the new loan  
17 servicing agent has not performed -- at least it is not  
18 apparent to me that they've performed any due diligence at this  
19 particular point in time. There was no due diligence  
20 represented to me. Mr. Canepa himself opposed appraisals and  
21 you, Your Honor, in your wisdom saw that we have no ability to  
22 be able to believe in the current appraisals that are on file.  
23 And I'm concerned over any loan servicing agent that would just  
24 carte blanche agree to accept a loan to service without due  
25 diligence. It concerns me greatly.

1                   Give me one minute. My concern is if the Court  
2 determines to back charge me for the over payment of interests  
3 that's not performing in my portfolio and I can use my money  
4 from Boise-Gowan to offset this, I would prefer to have it that  
5 way versus to have my money that is in Boise-Gowan moved to  
6 another loan servicing agent and then for USA Capital to pursue  
7 me as a debtor of the estate. I would prefer basically at the  
8 end of the day to have this all taken a look at from a  
9 standpoint of a total portfolio versus money here in one pool  
10 and then money -- in one pot and money there in another point.  
11 So that extent, I would prefer to keep my loans together.

12                  I'm also concerned that if there is additional money  
13 required in order to make this loan -- the money right now  
14 that's coming -- that's causing performance is coming out of  
15 reserve accounts. It has been determined that perhaps another  
16 \$125,000 is required in order to protect the value of this  
17 loan.

18                  **MS. DAVIS:** Your Honor, I need to object again.  
19 Ms. Cangelosi is getting a little far afield of her concerns  
20 and she's starting to testify about matters not in evidence.

21                  **THE COURT:** Well, you talked about the 125, so I'll  
22 listen to her point about the 125.

23                  **MS. CANGELOSI:** In addition, Your Honor, it was in  
24 the declaration of Mr. Canepa that was filed. Of that  
25 \$125,000, that would probably mean that I need to extend the

1 loan servicing agreement past -- or the loan past August 25th,  
2 otherwise there would be no reason to have additional monies  
3 going into that particular borrower.

4                   Frankly, Your Honor, I feel safer in the bankruptcy  
5 proceedings under your watch than I do moving to a new loan  
6 servicing agent. I just feel safer.

7                   **THE COURT:** All right. Thank you very much.

8                   **MS. CANGELOSI:** Okay.

9                   **THE COURT:** All right. Oppositions?

10                  **MS. DAVIS:** Your Honor, if I can just make one  
11 clarification?

12                  **THE COURT:** Uh-huh.

13                  **MS. DAVIS:** That the statements by Ms. Cangelosi are  
14 unsworn representations as opposed to testimony.

15                  **THE COURT:** Well, she's just representing her  
16 position. I don't think there was really any facts -- and she  
17 did file a opposition to the motion. So I don't think there's  
18 any facts here and they were just her position on the issue.

19                  **MS. DAVIS:** Thank you, Your Honor.

20                  **MS. JARVIS:** Your Honor, on behalf of the debtors,  
21 I'd like to address first Mr. Canepa's motion for relief from  
22 stay. And we have to focus -- this is with respect to only one  
23 loan, which is the Boise-Gowan loan, and it's with respect to  
24 this loan that he must demonstrate that cause has been shown  
25 for relief from the stay. This loan is a performing loan, it's

1 fully paid up on principal and interest. There is some amount  
2 being held at PDG, when that is released the money that he  
3 complains about is being owed will be in the DIP collection  
4 account, March and April, and will be available, and the  
5 debtors do intend to have that distributed to him in accordance  
6 with a motion to be filed and heard on July 25th.

7           **THE COURT:** So let me cut to that issue. When do you  
8 anticipate -- and tell me looking forward to this motion, what  
9 does this motion -- in essence, what do you anticipate -- when  
10 do you anticipate being able and how do you anticipate being  
11 able to pay the various categories of loans? So what do you  
12 anticipate?

13           **MS. JARVIS:** We anticipate at this point distributing  
14 what's in the collection account according to how it was  
15 accounted for and which loans it came from. So for instance,  
16 on performing loans we have post-petition interest that's been  
17 coming in on a regular basis. That would be distributed to  
18 those on the performing loans. And those -- when you're  
19 performing -- the loans are performing, that means that there  
20 would not have been any overpayments because -- on that  
21 particular loan because it has been paying on a regular basis.  
22 On non-performing loans it's a little bit trickier of a  
23 situation because in some cases we have collected past due  
24 interest, but then of course we have paid out -- the debtors  
25 have paid out interest pre-petition. So we would propose a

1 procedure to deal with that. At this point, you know, we are  
2 still working out the figures because again, you know, we need  
3 to look and see exactly how it all plays out and that is not  
4 going to be available until -- we'll get a snapshot now, but  
5 also the ultimate snapshot will be about July 1st.

6 So we would like at, you know, at the proposal for  
7 dealing with those who have been overpaid. I think at this  
8 point they would -- that interest would not be distributed to  
9 them. I think we would take the position -- and there's a  
10 variety of ways to look at it. Your Honor has talked about one  
11 way, there's recoupment, there's possible offset, which is  
12 between loans and that's a little bit trickier of a situation.  
13 There's also the issue we raised, which is being equitably  
14 subrogated to their claims against the borrowers, where in  
15 essence the debtor then takes the money that it collects from  
16 the borrowers that they've already paid out and keeps that  
17 because it's already paid that amount out.

18 There also are issues, for instance -- and I hate to  
19 complicate this even more, but just raising this issues, which  
20 I think Your Honor is aware of because it's not an easy  
21 situation. If there are, for instance, overpayments that were  
22 made that, you know, were from a long time ago, one way of  
23 dealing with -- possibly dealing with those would be 502(d) as  
24 well, which in the America West case in the Ninth Circuit  
25 allows you to do that even if there are statute of limitations

1 that have been passed, in essence offset or against claims  
2 against the estate. So there are a lot of varieties. It's  
3 part of the reason why we feel like this needs to be noticed  
4 fully, you know, why -- I don't think we can just, you know,  
5 respond to a pending motion to pay because these are complex  
6 issues and we want to lay it out so everyone clearly  
7 understands how each category is being treated, each investor  
8 will understand what is being proposed with respect to payments  
9 to them, and so there can be objections filed by parties or,  
10 you know, input sought if they believe it should be treated in  
11 a different way.

12 So it's not just a simple we disburse everything.  
13 With performing loans it's a lot more simple, but again, then  
14 you've got the issue of the interrelated loans as well, so it  
15 is a complex issue. It's part of the reason why we're asking -  
16 - I mean, this is really primarily why we're asking the Court  
17 not to grant relief from the stay because under Section  
18 362(a)(3), which Mr. Canepa has acknowledged does apply here,  
19 this is precisely what the debtors -- what the stay is designed  
20 to allow us to do; avoid a grab of assets of the estate or even  
21 assets that are not property of the estate, but in possession  
22 of the debtor while the debtor sorts out where these assets  
23 belong and who they should be paid to.

24 As the Court has noted, you know, both under the loan  
25 servicing agreement and under the Nevada statutes, it's

1 important that these payments be made to the proper parties.  
2 In the past this hasn't always been done and we are attempting  
3 to and trying to make sure that this is done in the future and  
4 would ask the Court's blessing on this because it isn't an easy  
5 situation.

6           **THE COURT:** So the debtor's intent is to file this  
7 motion so that it will be heard July 25th and then pay,  
8 assuming the motion was granted?

9           **MS. JARVIS:** Yes.

10          **THE COURT:** Pay when?

11          **MS. JARVIS:** Right.

12          **THE COURT:** Pay immediately thereafter?

13          **MS. JARVIS:** Immediately. Immediately thereafter,  
14 yes.

15          **THE COURT:** And do you have any sense -- would that  
16 just be on -- well, what would you do -- well, I guess we have  
17 to deal with it then.

18          **MS. JARVIS:** Yeah, it would be -- yeah, it's the  
19 monies that are sitting in the collection account right now.

20          **THE COURT:** And, of course, it would be just the  
21 performances, because there's no money in there from the non-  
22 performances.

23          **MS. JARVIS:** We have collected some in the past. For  
24 instance, some --

25          **THE COURT:** Okay.

1           **MS. JARVIS:** -- some -- Ms. Cangelosi mentioned that  
2 two loans were collected post-petition. Those would have been  
3 non-performing loans that were collected post-petition, so that  
4 money would be available, subject to working out the problems  
5 of the overpayments to be disbursed to those loan holders.

6           **THE COURT:** Okay.

7           **MS. JARVIS:** So yes, there would be some that deals  
8 with that.

9           Let me also turn -- there's been a lot of discussion  
10 with respect to the 51 percent and let me just put this --

11          **THE COURT:** Well, Ms. Davis fixed the problem, to the  
12 extent there is a problem, because she's now got both number  
13 and --

14          **MS. JARVIS:** Yeah, I'm going to raise a different  
15 issue.

16          **THE COURT:** Oh, okay.

17          **MS. JARVIS:** Okay. We keep talking about the --  
18 those on performing loans that have 51 percent and want to get  
19 out of the estate, but if you look at 51 percent it only comes  
20 into play where there is in the event of default, foreclosure  
21 or other matters that require action, if for any reason USA  
22 fails to act on lenders' behalf. That means that if it's --  
23 and this is default not of the servicing agreement, we're  
24 talking about --

25          **THE COURT:** Where are you reading -- oh, pursuant to

1 --

2 **MS. JARVIS:** Yeah.

3 **THE COURT:** -- in the event of default. Okay.

4 **MS. JARVIS:** In -- yeah. We're talking about  
5 defaults on the underlying loans. So performing loans wouldn't  
6 even fit under this provision. It's only non-performing loans  
7 and again, if this -- we get to this situation and the USA  
8 fails to act. Now part of this issue, with respect to even the  
9 payments post-petition, but also with the failure to act is  
10 separating the distinction between the pre-petition debtor's  
11 management and the post-petition debtor, because we -- the  
12 reason why the stay is in effect is so the debtor can attempt  
13 to basically cure and deal with the problems that may have  
14 occurred in the past. The fact that there may not have been  
15 any foreclosure actions taken -- and by the way, in a  
16 performing loan there wouldn't be any grounds for that, but  
17 even if there was a non-performing loan, we need to be given  
18 the -- or the debtors need to be given the opportunity to act  
19 on that, which is exactly what we've been doing.

20 **THE COURT:** So you're saying the event of default --  
21 you're saying -- what about other matters that require action?  
22 You're saying that is just -- and I don't know have the statute  
23 in front of me -- or do I? You're saying that's just default  
24 action and that's not payment of monies, et cetera?

25 **MS. JARVIS:** Well, and even if it's payment of

1 monies, again because the stay protects us and allows us time  
2 to sort this out to make sure we stay the proper parties, when  
3 you look at, if we fail to act, you have to look at it in the  
4 context of failing to act in this bankruptcy case, where we are  
5 constrained by, you know, the statute and by making sure that  
6 we use the stay properly to make sure the proper parties are  
7 paid.

8                 And this is important to realize because, again, what  
9 this means is this 51 percent, if it is only with respect to  
10 non-performing loans, then that means you -- performing loans  
11 can't use it, but non-performing loans, which have the  
12 overpayment problem, would fall in this category. So it is  
13 significant that the Court, I think, recognize the  
14 applicability of the stay and keep it into effect while we sort  
15 out the problems because on those non-performing loans the  
16 debtors do have some claims -- definite claims because there's  
17 been some overpayments.

18                 With respect to the Boise-Gowan loan, going back to  
19 that, there isn't any harm here that has been shown by  
20 Mr. Canepa from waiting because we do have, you know, interest  
21 that will be payable to him later on. And the breaches that  
22 have been alleged are all pre-petition breaches and that, under  
23 the case law, has been shown not to be sufficient to have cause  
24 from relief from the stay. Further, with all due respect, the  
25 opinion offered by the commissioner of the State and Division

1 of Mortgage Lending is inadmissible hearsay and it doesn't  
2 relate to this individual loan or to the circumstances of this  
3 individual loan and it also invades the purview of this Court  
4 as the interpreter of the law. It doesn't recognize the  
5 automatic stay or the jurisdiction of this Court, which  
6 combined to sometimes allow the debtor, as in this case, to  
7 temporarily have a respite from its contractual duties, its  
8 statutory duties when it's in accordance with the intent of the  
9 stay.

10 Further, even if this -- we would object to the  
11 admissibility of this opinion because it is inadmissible  
12 hearsay, but also because even if he could be qualified as an  
13 expert, which there's no foundation for that, his expert  
14 opinion is not an interpretation of the law, which is this  
15 Court's purview.

16 I would just mention real quickly the case of In Re  
17 Consolidated Industries, which Mr. Canepa relies on for asking  
18 for relief from stay, saying that he only needs to demonstrate  
19 a colorable claim to show relief from the stay, but this isn't  
20 precisely what the case says. What the case does say is the  
21 party has to show a colorable claim as opposed to -- in a  
22 summary proceeding for relief from stay as opposed to having a  
23 definitive determination of the claim in the property held.  
24 But that fact where you show a colorable claim that you might  
25 be able to base relief from stay on does not discharge the

1 party's obligation to then show that it meets the standard of  
2 either cause or lack of equity and not necessary for the  
3 reorganization. So those issues still have to be shown in this  
4 case. He has not shown cause.

5 In the case -- it's important to note as well that  
6 even -- that the Court did not allow a wholesale relief from  
7 stay on all the insurance policies at issue. In fact, all --  
8 what the Court said is, there's only one policy where there's  
9 been harm shown -- ongoing harm to the party shown. And I'm  
10 going to find -- the Court can find relief from stay to that  
11 instance. What the Court did say, when it explained that is,  
12 the Court that whether, "cause exists to terminate the stay is  
13 discretionary" and that "the Court should base its decision  
14 concerning whether cause exists to lift the stay on the  
15 hardships imposed on the parties with an eye toward the overall  
16 goal of the bankruptcy code."

17 And that's precisely what we're asking the Court to  
18 do here. Mr. Canepa is not harmed by continuing the stay. He  
19 will receive all the payments to which he is entitled when we  
20 get the Court's approval, but there is and could be significant  
21 harm to the debtor's estate.

22 **THE COURT:** Is there any reason why the payments on  
23 this particular loan couldn't commence immediately?

24 **MS. JARVIS:** We would -- well, again --

25 **THE COURT:** Only because we have a motion here, it is

1 one that is performing.

2           **MS. JARVIS:** It is performing, but again, you have to  
3 give it to all -- you have to deal with the issues in a way  
4 that the Court and all the parties feel comfortable with, with  
5 respect to Mr. Canepa may only have one loan that's held  
6 individually, but there are 17 investors and as demonstrated in  
7 Mr. Allison's declaration, they have multiple loans in other  
8 cases.

9           **THE COURT:** Okay.

10          **MS. JARVIS:** So you've got to sort out again all that  
11 problem. And this just shows, you know, the tremendous  
12 interrelationship between the estate. And so, I -- you can't  
13 really isolate one situation because it has impacts throughout  
14 there. In fact, I think if you look at the declaration of  
15 Mr. Allison, when you look at the borrower who's in this loan,  
16 that has, I think, nine other loans with this debtor, and the  
17 various investors -- the 17 investors, you're probably  
18 affecting about 1,000 investors in this case. So it's a very  
19 interrelated situation.

20           Another issue that actually was raised by Mr. Canepa  
21 is that this -- the Boise-Gowan property is half-owned by IP.  
22 Investment Partners is something I know that we have mentioned  
23 on and off in this Court to Your Honor. This --

24           **THE COURT:** And again, you go back and say is the  
25 property the borrower is -- what's half-owned? The loan is

1 half -- the note is half-loaned --

2 **MS. JARVIS:** The borrower --

3 **THE COURT:** Is half-owned?

4 **MS. JARVIS:** Yeah, right the borrower is half-owned  
5 by IP. And as Your Honor knows, we have -- Mr. Allison has  
6 testified that we have significant claims against IP. One of  
7 the things that is pending before this Court is a motion to  
8 fund that last piece. And we're not saying that that -- that  
9 we're not admitting that we have to -- that we are required to  
10 fund that, but we are asking to fund that because that's  
11 important to maintain the value of this property. And, of  
12 course, maintaining the value of this property is important  
13 because, again going to the kind of circle of how it's all  
14 connected, that maintains the value of property that IP has  
15 against whom we have a claim. So again, there is that impact  
16 as well. So it is not isolated incident.

17 If -- I would say that in this case, where there is  
18 no harm to Mr. Canepa, and where we are working to fairly  
19 balance the interest of all claimants, including those  
20 claimants as you have identified, which would include  
21 Ms. Cangelosi, who are the claimants who actually, of no fault  
22 of their own, had principal diverted pre-petition, it's  
23 important to maintain this -- these loans together to give us  
24 adequate time to be able to deal with them in an appropriate  
25 manner. We have indicated that we do intend to file a plan of

1 reorganization in July, which would be in the 120 exclusive  
2 period. The issue of this change of servicing fee provision  
3 and other provisions will be addressed. We intend to discuss  
4 those with the committees going forward to try to reach a  
5 proposal, to put in a plan in a comprehensive way that will  
6 fairly balance the interest of all constituencies in the case.  
7 Maintaining the automatic stay in effect is exactly what it is  
8 -- I mean, this is exactly what the automatic stay is designed  
9 to allow the debtors to do, and that's what we're asking the  
10 Court to give us the time to be able to do that.

11           Turning to -- just quickly to Ms. Chubb's motion, I  
12 would just mention that, with respect to those investors, we're  
13 not even sure what the effect would be because while we have --  
14 where the investors were identified, or certain investors were  
15 identified the day before we filed our response and a 2019  
16 statement has been filed, then in the reply brief they're  
17 actually are even more investors in that case. So we don't  
18 know, you know, how many investors would be in the category of  
19 being overpaid or underpaid or even what the difference is  
20 between the performing and non-performing loans. And that --  
21 in order to show cause for relief from the stay, I think that  
22 is critical to demonstrate, you know, again that there is some  
23 need for that and that their needs outweigh the rights or needs  
24 of the debtor, and that has not been established.

25           I can tell you that, for instance, one of the parties

1 that she represents that's a part of this motion for relief  
2 from stay is the Fertitta Company. And I believe that our --  
3 when our accounting comes out, from my latest information, they  
4 will be -- have been overpaid probably around the amount of  
5 \$2.1 million. So this is significant and those factors need to  
6 be determined before any relief from stay should be granted  
7 because of the substantial harm that it would cause to the  
8 estate and because the estate does have some interest.

9           In addition, in both these cases they're trying to  
10 ask for the relief from the stay to be granted to terminate the  
11 contracts. The contracts are property of the estate. You  
12 know, maybe that the proceeds that we intend to pay over are  
13 not property of the estate, but the contracts are and they are  
14 the life blood of this reorganization. It is important for  
15 those creditors -- all the creditors of this estate to have  
16 those dealt with in a comprehensive fashion to make sure that  
17 the value of this company to the benefit of those -- I guess  
18 sort of what I would say, those losers in this case, meaning  
19 those that were not paid their principal, those that are in  
20 loans that will never fully recover their principal, and that  
21 value needs to be maintained.

22           On all these grounds, Your Honor, we would simply --

23           **THE COURT:** Any specific comments on Mr. LePome's?

24           **MS. JARVIS:** Actually, this is a different issue,  
25 because what I'm dealing with --

1                   **THE COURT:** This is interpleader, correct?

2                   **MS. JARVIS:** Yeah, exactly. What I'm dealing with is  
3 the collection account and what he's deal -- talking about is  
4 the investor account, and that is the interpleader.

5 Mr. Schwartzer is prepared to deal with that and the debtor is  
6 nearly prepared to file an interpleader action in order to have  
7 the Court determine that. So I think that is -- you know, that  
8 is an entirely different situation.

9                   **THE COURT:** Okay. All right, thank you.

10                  **MS. JARVIS:** Thank you, Your Honor.

11                  **MS. DAVIS:** Your Honor, with all due respect to my  
12 friend and colleague, Mr. Merola, I don't believe that he filed  
13 any response to my motion for relief from stay.

14                  **MR. MEROLA:** Yes, we did, Your Honor. We filed an  
15 omnibus reply to all of the motions for relief from stay and to  
16 release funds in conjunction with our support of the motion for  
17 a temporary stay holding funds. It's the same pleading. It's  
18 Document Number --

19                  **MR. SCHWARTZER:** Three-seventy-nine.

20                  **MR. MEROLA:** -- 379.

21                  **MS. DAVIS:** I apologize, Your Honor. The docket in  
22 this case is just a nightmare.

23                  **MR. MEROLA:** I'll be very, very brief, Your Honor.  
24 Frank Merola on behalf of the First Trust Deed Committee. We  
25 filed a pleading that supported the debtor's request for a

1 temporary hold on distributing funds and an opposition to the  
2 motions that sought to terminate servicing agreements and/or  
3 compel immediate payment of funds.

4                 The automatic stay is one of the most fundamental  
5 protections of bankruptcy law. And we've heard a lot of the  
6 Movants talk about the debtor's various purported obligations  
7 under state law or under the contracts. That's exactly what  
8 the automatic stay is about. It's to give this debtor some  
9 breathing room without those obligations so it can sort this  
10 mess out.

11                 Now I have to admit, I'm kind of surprised by the  
12 tenor of some of these motions. If we were sitting here six  
13 months from now, or two years from now, and there had been no  
14 cash distributed, I would certainly understand the vehemence.  
15 We're here 60 days after a company, with 3,600 investors, have  
16 the management walk out and we're trying to reconstruct this  
17 from ground zero.

18                 Now that's where we are, but we get these motions to  
19 terminate the servicing agreement. That's not what these  
20 motions are about. It's not about the servicing agreement.  
21 It's about taking possession of the underlying loans for the  
22 benefit of certain well-represented investors, to the detriment  
23 of the estate, and to the possible detriment of the other  
24 investors in the same loan. It's about cherry picking and  
25 that's what's going on here.

1                   In terms of relief from stay standards under 362(d)  
2 we've heard two arguments, pre-petition breaches of contractual  
3 obligations. The law is clear, pre-petition breaches of the  
4 contractual obligations do not constitute cause for relief from  
5 stay, otherwise everyone would get relief from the stay because  
6 by definition the debtor has been a bad boy and has not done  
7 what he's supposed to do, whether paying a bank, whether paying  
8 on his car lease, he's breached it. So the pre-petition breach  
9 is not itself grounds for relief from stay. There is no  
10 allegation that there's a post-petition breach of the  
11 obligations, except as ordered by this Court. If the breach is  
12 that Mr. Allison is not currently remitting funds based on this  
13 Court's order that has told him he doesn't have to remit funds  
14 yet, that's not a breach. So that's where we are.

15                   There's no basis for relief. Interestingly, there is  
16 not a mention in any of these motions that people are not  
17 adequately protected. That's what -- that is what relief from  
18 stay is about under 363(d). There is no mention that taking  
19 this money, if it's being paid, and putting it in account -- a  
20 segregated account, does not adequately protect them, keeping  
21 in mind for the short period of time we're talking about. The  
22 debtor hasn't asked to hold this money until confirmation of a  
23 plan. The debtor has asked until the end of July, and given  
24 the circumstances, that seems very reasonable.

25                   Now I think Ms. Davis did the best factual job of

1 developing her case, but that means it also creates the best  
2 example of how complicated all this is. We're very careful to  
3 be told that the Movant, Mr. Canepa, only has one loan, but  
4 that's only part of the story, because the Scott K. Canepa  
5 Defined Pension Plan and Scott K. Canepa as the trustee for the  
6 Evelyn Canepa trust, has nine loans. And if you look at  
7 Paragraph 4 of Mr. Allison's supplemental declaration they come  
8 in chocolate, vanilla and strawberry; performing, non-  
9 performing and completely repaid. It strains credulity that  
10 Mr. Canepa should be able to take the one loan where he's a  
11 direct investor, even though the estate might have claims or  
12 causes of action against his in teste trust or his pension plan  
13 and leave those behind, that's the kind of cherry picking we're  
14 engaged here.

15                   But more importantly, and it's brought out by  
16 Ms. Cangelosi, you also have to look at the other 17 investors  
17 because if he was -- if there were no claims whatsoever against  
18 him, you have to look at the other 16 investors in this loan.  
19 And to be very honest, in this loan that's fairly easy because  
20 there's only 17. Most of these loans that people are seeking  
21 to terminate the stay for have hundreds of investors, that  
22 you'd have to go down and look at each of those investors.

23                   Now, a lot has been said about whether there's a  
24 claim or there's not a claim. Let me tell you my position on  
25 that. If someone got money that they weren't entitled to,

1 there's a claim. Whether it's a fraudulent conveyance claim,  
2 whether it's a common law claim, I like Your Honor's servicer  
3 example, I have a slightly different one, that I'm a servicer,  
4 no bankruptcy, three people are due checks. I send one person  
5 two checks and I don't send the third person the check. No one  
6 in this courtroom can tell me A, I don't owe the third person  
7 the money that I didn't send the check and B, I don't have a  
8 remedy against the person that I paid twice.

9 Now there's a lot to be said about whether it's  
10 recoupment or whether it's not recoupment and Your Honor's  
11 right dead on this. The Fireman's Fund -- Newbery Corporation  
12 versus Fireman's Fund, the Ninth Circuit case written by  
13 Kozinski, very broad doctrine of recruitment that allows us to  
14 offset these. And you know what, Your Honor, notwithstanding  
15 everything that's been said today, they better hope that  
16 there's recoupment, because if there isn't recoupment and  
17 there's a claim, what we're going to have to do is we're going  
18 to have to file complaints against everyone and start moving  
19 for summary judgment and start trying to get prejudgment  
20 attachment.

21 That's not the way for this case to get resolved.  
22 The way for this case to get resolved is when people have --  
23 when the debtor has claims against people and people have  
24 claims against the debtor, to have some truing up mechanism in  
25 the plan. And to do it piecemeal with five and ten and fifteen

1 individual investors trying to pull their loans is just going  
2 to make a half shot of it.

3 Now if you get around the claim issue that -- which  
4 is very complicated because you have to look at not just an  
5 individual direct lender, but all of his affiliates. Most of  
6 these people are in under several different hats; it's their  
7 trust, their pension fund, their 401(k), their kids' college  
8 fund. You have to look at all those together. Then you have  
9 to look at all the investors in that loan that are not that  
10 person, but it's more complicated than that and you have to  
11 look at, for example, this borrower. This borrower in the case  
12 of the Canepa loan has 10 other loans. To allow them to take  
13 one loan out and might totally change the negotiation and the  
14 structure of how you deal with the other loans. This loan also  
15 has insider guarantors. And as I said at the last hearing,  
16 we're going to have to deal with an issue of how people are  
17 going to be going against the insiders, but it doesn't make  
18 sense to have 3,600 people all suing the insiders individually.

19 And then finally, this has an insider borrower, which  
20 is a real nice asterisk on this one. That the actual borrower  
21 here is somebody that the estate might have causes of action  
22 against. So you really got to raise your eyebrow and wonder,  
23 for a loan that's performing, a loan that's current, the cash  
24 is there, now we have some borrowers trying to -- some lenders  
25 trying to move it out of the purview of this Court when all the

1 parties need to be here for one reason or another.

2 The temporary request by the debtor-in-possession to  
3 not pay funds and the opposition to the various motions to  
4 terminate servicing agreements or to turn over loans is  
5 appropriate in measure. If this debtor does not live up on its  
6 promises to come up with a mechanism to true up these, we're  
7 going to have different issues, but for now you've got to let  
8 them get their house in order before you let people start  
9 ripping things off the shelves and that's what this is.

10 **THE COURT:** Okay. Oh, Ms. Scann's back there too.

11 Either one of you, which --

12 **MR. LEVINSON:** I'm closer. I'm Marc Levinson,  
13 proposed counsel for the Diversified Fund Committee. I filed  
14 no pleadings in connection with this motion because I hadn't  
15 been called at that point in time. I'd just like to say a  
16 couple of points on behalf of the thousands of investors in the  
17 Diversified Fund who have loaned \$110 million -- invested \$110  
18 million. And it's just one point, I won't add to Mr. Merola's  
19 brief statement.

20 And that is that Ms. Chubb earlier said that if her  
21 clients got a chance to take the money they would quote, "Take  
22 the money and run." If money is paid out to the direct  
23 investors, they will take the money and run and we'll have to  
24 chase them in other courts. If money is paid out to my fund or  
25 Mr. Merola's fund, we can't, we're in this Court, and that

1 would be unfair to our court -- to our investors as well, who'd  
2 still be subject to the jurisdiction of the Court, who could  
3 not get the money themselves, because the money would go to the  
4 fund, and of course we can't distribute until there's a plan.  
5 So let the other investors take the money and run and have to  
6 be chased in the State Court.

7                   So as a matter of equity, at the very least, I join  
8 Mr. Merola in saying, let's wait until the end of July, let the  
9 debtor perform on its promise to see if there's some sort of an  
10 equitable way to deal with these recoupment issues and then  
11 we'll see where we are.

12                  **THE COURT:** Okay. Ms. Scann?

13                  **MS. SCANN:** Good morning, Your Honor, Susan Scann. I  
14 didn't file anything in connection with this either, because I  
15 didn't really recognize -- I couldn't find it in the docket  
16 initially and then when I got the pleadings. I represent the  
17 borrower, the unheard from party in this case, and I just  
18 wanted to make a couple of comments.

19                  The borrower, from our point of view, it's premature  
20 really to lift the stay on this. The loan is performing. We  
21 have a loan agreement that is signed by the lenders in this  
22 case, that provides for an approved budget of up to a certain  
23 amount of money. So it appears that there may be a conflict  
24 between what they signed with the mortgage lender on one part,  
25 but the agreement that they signed with us says that there can

1 be an increase in the loan to a certain point, so there can't  
2 be a breach as to that.

3                   And then down the road there's going to be some  
4 additional business to be done here because this loan comes due  
5 in August. Mr. Canepa says he wants to foreclose, my client  
6 may well be asking for an extension or a development loan.  
7 Who's going to broker that loan? There's going to be some  
8 business that's going to go on here. Is the debtor still going  
9 to be viable at that point? Do we need -- are we going to be  
10 going outside the debtor? I think that there are negotiations  
11 that have to take place before it would be appropriate to lift  
12 the stay in this case, probably for the benefit of the estate  
13 to preserve the business, and for the benefit of the borrower  
14 too because the project is ongoing and, you know, there's money  
15 to be made here for people.

16                  **THE COURT:** Okay. Ms. Freeman?

17                  **MS. FREEMAN:** Susan Freeman for the Unsecured  
18 Creditors Committee. I will try not to duplicate, Your Honor.  
19 This is very much a matter of the Court's discretion and it  
20 seems very clear that the Court has a good handle on the  
21 balance of the hardships here. It is a matter of the loss of  
22 the servicing income, which is a contractual right, a property  
23 of the estate, and that increases the burden of administering  
24 remaining loans and causes inefficiencies and a hardship on the  
25 estate overall with respect to all of the loans when the best

1 ones go out the door. And it also results in a real risk of  
2 loss of jurisdiction to deal with these loans, which is an  
3 enormous hardship on the unsecured creditors of this estate.  
4 And on the other hand you have a very brief stay, a very brief  
5 delay in their ability to collect.

6 I do want to make a specific point with respect to  
7 the proposal of the executory contracts committee, that there  
8 be some kind of general abstract adequate protection and that  
9 the stay be lifted effective July 25. With respect to the  
10 overall granting of adequate protection across the board, you  
11 don't have a motion for such relief. The Court -- we already  
12 have sufficient adequate protection in the sense that the money  
13 is there and is in interest bearing accounts and segregated. I  
14 specifically disagree with the notion that nothing can be done  
15 with these loans by way of adequate protection as a matter of  
16 holding on to the status quo, because with respect to the one  
17 loan, for example, that we're dealing with here, there is a  
18 motion by the debtor that's set for a hearing on the 21st to  
19 advance an additional \$125,000 for paying engineering fees.  
20 Now that kind of additional advance, within the scope of the  
21 overall loan budget of this particular borrower, may well  
22 result in increased value, presumably they're not putting money  
23 out unless they look at it and realize it's going to bring in  
24 more than value than they're expending, but that increased  
25 value increased the likelihood that the borrowers -- or that

1 the lenders on those particular loans will be paid in full,  
2 that in fact the value will be there in the asset by virtue of  
3 some additional advance that will result in payment in full.

4                   And likewise, it's important for the debtors to be  
5 able to take action to secure whatever they can, by way of  
6 assets from the investment partners, and yes they're half-  
7 borrower on this, and that would affect this particular loan.  
8 All of these things can come to the Court bit by bit on  
9 specific additional requests, nobody is being harmed, they're  
10 not being inadequately protected by virtue of having -- not  
11 having a complete freeze. We should be able to come to the  
12 Court -- the debtor should be able to come to the Court and  
13 deal with each of these loans on an individual basis and that  
14 protection of having the Court here, and the Court looking over  
15 each of these loans, is an important component of adequate  
16 protection to the direct lenders who are involved and to  
17 everybody. Ms. Cangelosi's comments, I think, brought that  
18 home in a very real way from the standpoint of an individual  
19 person who is affected.

20                   So we would ask that the Court not give a broad  
21 advisory opinion as to what's needed to adequately protect  
22 anymore than just having the money in the account. And then  
23 with respect to this particular loan, where we have the 51  
24 percent of the people, but not a default yet that would make  
25 the 51 percent even kick in, the hardships -- the balance of

1 the hardships really warrants continuing the stay, not allowing  
2 any termination, not allowing any cherry picking until we can  
3 really sort out how everything plays out.

4           **THE COURT:** Okay.

5           **MS. FREEMAN:** Thank you.

6           **THE COURT:** Okay. Mr. Schwartzer, since you're  
7 handling the investor -- Mr. LePome's motion, I just need to  
8 understand your position on his motion.

9           **MR. SCHWARTZER:** Yes. Your Honor, Mr. LePome's  
10 motion on behalf of Ronning and Alexander deal with money  
11 that's in the investor account. That account was used for  
12 investors to put money to be made -- to make loans. It was  
13 also used in a different way that may or may not have been  
14 appropriate under Nevada law. When an investor wanted to get  
15 out of a loan, the debtor, for a service fee, would agree to  
16 find another investor to take over their percentage and  
17 basically do an assignment of their percentage of a specific  
18 deed of trust.

19           So what would happen is, the money would be paid in  
20 by the new investor, would pay money into the investor account,  
21 the deed of trust would be assigned to the new investor and  
22 then the money would be paid out of the investor account to the  
23 old investor who no longer had an interest. At the date of the  
24 filing of the petition there was \$1.7 million in that account -  
25 - actually, \$1.8 million in that account. There were checks

1 outstanding to various people who had sold their interests and  
2 those checks were stopped by the bank because of the filing of  
3 the petition, except apparently for one \$100,000 check.

4                   What we now have a situation is, is that there are  
5 people who were going into investments and people coming out of  
6 investments are both saying, I just want my cash back. And in  
7 fact, we have a pool of about \$1.8 million and \$3.6 million in  
8 claims because nobody wants their investment, they want the  
9 cash. The --

10                  **THE COURT:** And the estate -- so that I'm clear. The  
11 estate doesn't claim any interest in that money. The problem  
12 is the estate doesn't want to be held liable for --

13                  **MR. SCHWARTZER:** Right. Well, I shouldn't say the  
14 estate. There is -- I think the Diversified Committee was one  
15 of the selling investors.

16                  **THE COURT:** Excuse me, USA Commercial.

17                  **MS. FREEMAN:** USA Commercial Mortgage has no claim on  
18 the money. We are -- we actually have prepared a complaint and  
19 interpleader to name all the parties. It's about 34 -- it's  
20 about 30 parties who will be named as defendants. The issue we  
21 had that we're going to deal with, and I think our solution is,  
22 are going to ask Mr. Houston, who the Court -- we formally  
23 mentioned would be special counsel in case of conflicts to be  
24 the Plaintiff's counsel. And then we realized since there is -  
25 - one of the debtors is a defendant in that, what we would do -

1 - probably do -- and I think it's the Diversified -- no, I'm  
2 sorry, it's the First Capital -- the First Trustee Fund, we're  
3 going to ask the committee for the First Trustee Fund to  
4 represent the First Trustee Fund in that case, so we're not in  
5 the situation of suing ourselves.

6           **THE COURT:** Right.

7           **MR. SCHWARTZER:** We don't want to be on either side  
8 of that. But the problem is, with both the Alexander and the  
9 Ronning motion, is that this is a fund and some people were  
10 going into investments and some people were going out of  
11 investments. The Court has to make a rule that applies to  
12 everybody in those investments.

13           **THE COURT:** Well, you know, I guess I'm a little  
14 confused. I should have asked Mr. LePome. He was arguing  
15 about lift stays, but your motion was just authorize return,  
16 right Mr. LePome?

17           **MR. LE POME:** Your Honor, we opposed the motion to  
18 delay payments, and that's what I was speaking on first.

19           **THE COURT:** Oh, okay. So you --

20           **MR. LE POME:** I haven't spoken on this one yet.

21           **THE COURT:** Oh, all right. So -- okay. So you were  
22 talking about -- you were looking ahead to the converse of the  
23 motion to withhold?

24           **MR. LE POME:** Yes.

25           **THE COURT:** Okay.

1                   **MR. SCHWARTZER:** He was -- that's what I thought he  
2 was talking about, the motion to temporarily hold funds.

3                   **THE COURT:** Since they're really the flipside of the  
4 same issue. And I'm not going to have argument on the motion  
5 to withhold, because it's just the flipside of the same issue.

6                   **MR. SCHWARTZER:** Right. With -- he didn't argue  
7 about the Alexander or Ronning motions, but that's what they're  
8 about.

9                   **THE COURT:** Okay. All right. So -- but your point  
10 is on Alexander -- now, would you have any objection to --  
11 certainly they're authorized to return -- well, he didn't ask  
12 for lift stay, so it's just authorizing return. Okay.

13                   **MR. SCHWARTZER:** Yes.

14                   **THE COURT:** Okay. All right, Mr. LePome?

15                   **MR. LE POME:** Your Honor, on Ronning, you'll recall  
16 on the 5th of June I said I wanted this matter set over to the  
17 15th of June. The reason is that when Mr. Allison filed his  
18 reply brief and included the copies of the assignments, that's  
19 what they look like. On June 1st I got a phone call --

20                   **THE COURT:** Well, let me ask you this. The point is,  
21 how can I order the return of the money when there's certainly  
22 a -- why isn't the interpleader -- why isn't your being the  
23 interpleader sufficient?

24                   **MR. LE POME:** Oh, the interpleader will work  
25 beautifully.

1                   **THE COURT:** Okay.

2                   **MR. LE POME:** I want to see the interpleader and I  
3 will ask Lenny to send me an advanced copy. Counsel did that  
4 and we got it resolved in record speed. And the reason -- I'll  
5 say this because it's on the record now. The United States  
6 Trustee got an advance notice and so did Scott Bice of what  
7 happened here. This is not Grable Ronning's signature. The  
8 affidavits of forgery were filed two days ago in Number 609.  
9 So obviously we need an interpleader to resolve that issue.

10                  **THE COURT:** Okay. All right, thank you. Okay, brief  
11 reply?

12                  **MS. DAVIS:** Yes, Your Honor. I'm just going to give  
13 you a bit of a laundry list.

14                  First of all, I want to make sure I haven't misled  
15 you regarding who my clients are and who I represent. I refer  
16 you to my 2019 statement at Document 555, which is somewhat  
17 easy to remember. I represent seven persons and entities who  
18 are in thirteen different direct loans, just to make that clear  
19 for the record. One way we might be able to resolve this  
20 motion is by my client offering to pay -- compensate the estate  
21 for the \$2,020 that it potentially might lose from the  
22 servicing of this loan in the remaining two months of its life.  
23 I would be willing to make that offer as a condition of  
24 granting this motion.

25                  Now let's focus for a moment about who Mr. Canepa is.

1 Scott Canepa is not a creditor of USA Commercial or any other  
2 of the debtors; he's a direct lender to the Boise-Gowan loan.  
3 The contracts should be enforced, a deal is a deal. The loan  
4 servicing agreement is no different. A debtor-in-possession is  
5 required to comply with the law. That means it's fiduciary and  
6 other state law obligations and responsibilities as a mortgage  
7 loan broker regulated by the State of Nevada. Mr. Canepa and  
8 the nine other direct lenders who have joined his motion, have  
9 satisfied the language of a loan servicing agreement regarding  
10 the 51 percent.

11           **THE COURT:** What about --

12           **MS. DAVIS:** The argument that Ms. Jarvis --

13           **THE COURT:** Yes, uh-huh.

14           **MS. DAVIS:** Ms. Jarvis makes the argument based on  
15 her underlying assumption that there are no "defaults" under  
16 the arrangement between the loan servicing agreement -- the  
17 loan servicer -- I'm sorry, let me start over. There is no  
18 breach of a loan servicing agreement itself. That's wrong;  
19 it's been said about five times. I've said about five times  
20 there are breaches.

21           **THE COURT:** No, her point was, and if you want to put  
22 that back up, her point was that that only triggers in if it's  
23 a default, not under the loan servicing agreement, but default  
24 as between the borrower. I believe that's your point, right  
25 Ms. Jarvis? You're saying default isn't between -- default

1 between these two parties, but default between the borrower and  
2 I don't --

3           **MS. DAVIS:** She -- with all due respect, that's only  
4 the first half of Paragraph 3, and I've cited the full  
5 provisions of it. I don't have it to pull and put up there,  
6 Your Honor, but I would respectfully disagree with the  
7 interpretation of the contract.

8           **THE COURT:** Okay. So you say it applies if there's a  
9 -- if they failed to do something? It's not merely upon  
10 failure to start a foreclosure?

11           **MS. DAVIS:** Absolutely. And if you look at the rest  
12 of Paragraph 3, which is quoted in my brief, you'll see that.  
13 Plus, the statute itself is a little more specific as well.  
14 And I cited that in one of my briefs, but unfortunately it's  
15 not one of the matters that it is before Your Honor.

16           I heard the colloquy between Your Honor and  
17 Ms. Jarvis regarding what the solution to the problem is going  
18 to be in the terms of the motion to pay funds. What I heard  
19 was no solution. What I heard was very few people are going to  
20 get paid. They're going to continue to withhold money. I  
21 don't know that we have a solution the problem. What I think I  
22 really heard is that we don't really have a solution the  
23 problem until a plan of reorganization is confirmed. But I  
24 think I also heard that based upon Ms. Jarvis' representations,  
25 since the Boise-Gowan loan is a performing loan, and we have 51

1 percent of the direct lenders and 51 percent of the beneficial  
2 interests, they have our money, we should be entitled to  
3 relief.

4 USA did fail to act in this case, both pre-petition  
5 and post-petition. Pre-petition, the irregularities that  
6 they've talked about, but more specifically the two increases  
7 of the balance -- or excuse me, of the amount due -- I'm sorry,  
8 I'm just kind of curious as to what you're looking at, Your  
9 Honor.

10 **THE COURT:** I'm trying to look -- I'm listening at  
11 the same time, I really am. I'm sorry. I'm trying to figure  
12 out the reference in 645(b).

13 **MS. DAVIS:** Okay.

14 **THE COURT:** But I am listening at the same time.

15 **MS. DAVIS:** It is an --

16 **THE COURT:** I really do multi-task.

17 **MS. DAVIS:** You know, I found the older I get, the  
18 harder that gets. The problem I had --

19 **THE COURT:** I grew up watching TV and doing my  
20 homework, so --

21 **(Laughter)**

22 **MS. DAVIS:** It's Nevada Administrative Code, not NRS.  
23 I --

24 **THE COURT:** Oh, you're right.

25 **MS. DAVIS:** -- trip myself up every time that I try

1 to find it in the NRS.

2           **THE COURT:** Okay. Go ahead.

3           **MS. DAVIS:** So I thought maybe that was the problem  
4 you were having as well.

5           **THE COURT:** Okay. I'm sorry. Go ahead then.

6           **MS. DAVIS:** Focusing back on pre-petition, post-  
7 petition breaches. Pre-petition, the dollar amount of the loan  
8 was increased twice in violation of the loan agreement and the  
9 loan servicing agreement. Post-petition, Mr. Allison,  
10 notwithstanding the restrictions on the loan broker's license,  
11 is still poised to make \$125,000 loan that Mr. Bice would  
12 testify here today he can't make based upon the limitations in  
13 the license. They can't make it from their operating cash,  
14 they can't make it from funds from an individual. They have to  
15 use institutional lender funds, which they don't have, and this  
16 loan matures at the end of August.

17           Now we heard a lot about general equitable, you know,  
18 exceptions, general bankruptcy policies and all that stuff.  
19 I've adequately briefed it in my points and authorities, I  
20 won't repeat it, but once again, there is no bankruptcy  
21 exception to the rule that somehow enlarges state law rights  
22 and remedies or federal law rights and remedies or contractual  
23 rights and remedies beyond what they actually are. You can't  
24 put a gloss that isn't there.

25           Regarding the allegations that Mr. Bice's opinion is

1 hearsay, with all due respect to Counsel, Mr. Bice is the  
2 regulator, he is the commissioner, he is the person who decides  
3 whether or not USA Commercial holds a mortgage license. I  
4 requested judicial notice of his opinion and of his orders in  
5 my reply points and authorities.

6           **THE COURT:** See, I question that he can do that. Has  
7 he talked to the AG?

8           **MS. DAVIS:** He's here.

9           **THE COURT:** I got to have an AG's opinion.

10          **MS. DAVIS:** He's here. His AG is here.

11          **THE COURT:** In any case --

12          **MS. DAVIS:** In any case, Your Honor, he's made some  
13 factual findings and conclusions of law that we would very much  
14 like Your Honor to adopt on facts that are before this Court  
15 right now.

16          **THE COURT:** Well, they're not really relevant to  
17 today's hearing.

18          **MS. DAVIS:** Well, he --

19          **THE COURT:** They relate to the \$125,000 loan,  
20 correct?

21          **MS. DAVIS:** No. No, look at Exhibit O of my reply  
22 points and authorities. It is specifically relevant to whether  
23 or not we can terminate the loan servicing agreement on the  
24 Boise-Gowan loan, based upon pre- and post-petition breaches.

25          **THE COURT:** Oh, okay.

1           **MS. DAVIS:** That's what it --

2           **THE COURT:** Well, that clearly goes to my purview,  
3 not his.

4           **MS. DAVIS:** And again, I'm just asking that you adopt  
5 his findings and conclusions as your own.

6           I also have a lot of problems with these arguments  
7 that, you know, somehow because there's a bankruptcy filed,  
8 it's okay to breach some of your fiduciary and contractual  
9 duties, but not others, and you get to pick and choose, you  
10 don't have to make post-petition payments. You know, like the  
11 Section 105 arguments I've mentioned, there's just not a  
12 bankruptcy gloss that allows that. A deal is a deal is a deal.  
13 You've got to comply with your agreements.

14           We've talked about the \$125,000 issue. I'll raise  
15 that again when it's before Your Honor next week, unless Your  
16 Honor moves it to another date. Mr. Gordon's suggestion that  
17 this can all be solved by a continuance, unfortunately is not  
18 acceptable to my client. At the conclusion of my argument, I  
19 read to you a whole list of business and other reasons, which I  
20 won't read again, those are the bases for cause for relief from  
21 the automatic stay here.

22           The 365 issues are not determined. You cannot just  
23 automatically assume that these contracts are property of the  
24 estate. They're executory, they haven't been assumed. The  
25 *Lovett* and other cases that I've cited govern when and how a

1 contract is brought into the bankruptcy estate and when it is  
2 and is not property.

3 Again, the equitable arguments that were made,  
4 they're all fine and swell under a traditional situation where  
5 the person seeking relief from stay is a traditional lender  
6 with a security interest in the primary asset of the estate.  
7 That's not us here. We're talking about the very limited  
8 question of have we created colorable basis upon which to grant  
9 us relief from the automatic stay to exercise our contractual  
10 rights under the loan servicing agreement.

11 We're not cherry picking; we have the requisite  
12 support; we are supported by state law and the contract. We  
13 are here asking Your Honor to allow us to enforce our rights to  
14 recover our property. Not property of the estate, our  
15 property.

16 My motion did raise the question of adequate  
17 protection as alternative basis for cause for relief from the  
18 stay. Clearly if the allegation is true that there is some  
19 interest being accrued on these funds that is not being paid to  
20 the people whose funds are being held, well it certainly should  
21 be at minimum as adequate protection for the delay. And based  
22 upon the discussion that most of these issues are not going to  
23 be resolved until we get to the confirmation date, we don't  
24 know how long the money will be held.

25 And yes, I do represent chocolate, vanilla,

1 strawberry, raspberry, whatever, but they are different, they  
2 can't be lumped together. And in response to Mr. Merola's  
3 arguments that Scott Canepa wears different hats, he wears  
4 different hats and the setoff rights have to be exercised based  
5 upon the basis in which he has invested in those loans. We  
6 can't lump them all together and try and set them off against  
7 him, even assuming you have the right to do so, and I won't  
8 repeat those arguments either.

9 Give me just a second. I'll make sure that I've  
10 covered everything. Regarding the comment by Ms. Freeman that  
11 the Court may lose jurisdiction if the loan goes away, causes  
12 of action don't go away just because you lose possession of  
13 something. You still retain your state law rights and  
14 remedies. There is a serious question regarding Bankruptcy  
15 Rule 7001 and appropriate due process and other concerns, which  
16 have been briefed in my opposition -- excuse me, in my reply  
17 points and authorities.

18 In conclusion, Your Honor, we think we've established  
19 the basis upon which to grant this motion. We are very much  
20 hopeful that Your Honor will grant it.

21 **THE COURT:** Okay.

22 **MS. DAVIS:** Thank you.

23 **THE COURT:** All right.

24 **MS. CHUBB:** I know you want us to be brief. I'm  
25 going to incorporate Ms. Davis' legal arguments and try not to

1 repeat those.

2 I do want to comment with respect to the jurisdiction  
3 that the Court would have over people who got paid. The Court  
4 has jurisdiction over the fund, but it doesn't have  
5 jurisdiction over the members of the fund. Anybody that would  
6 be chased would be out there, so I don't see how that can make  
7 any difference. There's --

8 **THE COURT:** So we have to sue them?

9 **MS. CHUBB:** Yes.

10 **THE COURT:** Outside bankruptcy?

11 **MS. CHUBB:** You could sue them --

12 **THE COURT:** You can't do recoupment?

13 **MS. CHUBB:** I don't know that you can't. Well, you  
14 know what the problem is here --

15 **THE COURT:** So again, all your clients are -- want to  
16 be sued?

17 **MS. CHUBB:** All my clients want their money and what  
18 you want is to figure out a theory, which really isn't your job  
19 to do, about how the money that they might have gotten can be  
20 set off against the money they're entitled to get.

21 **THE COURT:** I understand, but you understand, under  
22 your theory, that all these clients have -- if you say  
23 recoupment doesn't apply -- and it may be recoupment doesn't  
24 apply --

25 **MS. CHUBB:** I'm not taking a legal position.

1                   **THE COURT:** -- but you're saying -- but you  
2 understand that lawsuits -- do you disagree with Mr. Merola  
3 that lawsuits would have to be brought?

4                   **MS. CHUBB:** In order to get money back from people  
5 who were overpaid? No, I don't disagree with that.

6                   **THE COURT:** Okay.

7                   **MS. CHUBB:** But I think there may be defenses to  
8 those.

9                   **THE COURT:** I understand.

10                  **MS. CHUBB:** But I'm -- what I'm saying is it's not  
11 a --

12                  **THE COURT:** But you have to go through the procedure  
13 of filing a lawsuit against every one of those people and those  
14 people defending the lawsuit?

15                  **MS. CHUBB:** I know, but if you don't have a right to  
16 set off, I'm sorry that's what has to happen.

17                  **THE COURT:** No, I appreciate it. Okay.

18                  **MS. CHUBB:** And my recollection, although I don't  
19 have as good a memory as Mr. Merola, was not that the Court  
20 said that the debtor didn't have to pay. I remember the Court  
21 saying, I don't see why you don't have to pay, but I'll  
22 entertain a motion to hold funds, which is the motion that's  
23 before you today. You haven't made any determination that the  
24 debtor can hold onto these monies and the debtor shouldn't be  
25 able to because it's not the debtor's money and it will never

1 be the debtor's money. This money -- and nobody has cited  
2 anything that says this money doesn't belong to the lenders.  
3 It absolutely belongs to the lenders and the lenders should be  
4 able to get their money.

5 There is a statutory duty to pay now and there's no  
6 basis -- nobody has brought forth a legal theory on which to  
7 set off or keep the money or not pay the money. They've taken  
8 the fees out, the statute says upon taking out the fees, you  
9 have to pay out to the lenders, and that's just not happening.  
10 And there is a prejudice that nobody has mentioned. The money  
11 is sitting there that our clients are supposed to be getting 12  
12 percent on it, they don't have their money and I don't think  
13 they're going to get interest on it, and if they do, since the  
14 money is just bearing interest at four-and-three-quarters  
15 percent, it's going to be somebody else's money. It should  
16 just be released now, otherwise they do set -- they do suffer a  
17 serious prejudice.

18 And even the debtor has said that it's problematic to  
19 set off among different loans. Maybe it's possible in a single  
20 loan to do it, although I don't see how that would happen, but  
21 among different loans, how can you possibly even think about  
22 doing that. So we should be getting our money right now. And  
23 the motion that is going to be pay is now apparently going to  
24 be pay people if they only have performing loans and they have  
25 no non-performing loans, so we're not going to be any further

1 ahead than we are right now.

2                 It's still going to be the same argument and we're  
3 going to go through a triple briefing process because we don't  
4 have an agreement to just respond to the motion to pay. We're  
5 going to get a new motion, we're going to have oppositions, and  
6 we're going to have replies. It's going to cost a fortune and  
7 it's just unnecessary.

8                 And with respect to our adding more people, I'm sorry  
9 if I don't add the people that have come onboard since I filed  
10 the last document, I think it would be inaccurate. So we amend  
11 our 2019 as -- on a daily basis -- we don't amend it daily, but  
12 on a daily basis come in or drop out or whatever.

13                 And with respect to Fertitta, if they owe the money  
14 somebody has to try and collect the money, but you got to have  
15 a legal theory to do it on. And in the meantime, that money  
16 should get paid out right now. Thank you.

17                 **THE COURT:** All right. On Ms. Davis' motion, I'm  
18 going to deny it as a preliminary matter and continue it until  
19 the July 25th hearing. Her motion has -- at least we have an  
20 actual Movant who meet the criteria of being able to even seek  
21 relief, because we have the 51 percent. And I will assume for  
22 the moment, as a preliminary matter, that her interpretation is  
23 correct, that she could bring such a motion.

24                 But as a preliminary matter, I find that it's more  
25 that Defendants will succeed at least at this stage, because

1 there is adequate protection. The monies are coming in.  
2 They're kept there. And based upon the debtor's representation  
3 that as of July 25th, or soon thereafter, the funds will start  
4 to be disruption, I find that the lifting of the stay outweighs  
5 -- the detriment on lifting the stay outweighs all benefit.

6 We have -- and I think it's very important that we  
7 have one of the investors on their loan who opposes. And I  
8 think it goes to show that sometimes the larger investors, you  
9 know, operate with clout that they really maybe not advise the  
10 individual investors that there's a downside to all this.

11 I agree with Mr. Merola and Ms. Jarvis that if you  
12 lift a stay as to one person, first of all, you have the loss  
13 of income for the executory contracts. The servicing rights  
14 are viable rights. We know from all these companies that are  
15 servicing companies outside of bankruptcy. They sell a  
16 portfolio for a significant amount of money. It's a valuable  
17 asset, the servicing rights. Secondly, once you start cherry  
18 picking these contracts, I seriously question the jurisdiction  
19 issue. Once those servicing contracts are gone, then what do  
20 you use for the forum. And perhaps this court has  
21 jurisdiction, but that means one more issue we have to fight  
22 over.

23 Whether or not there is a right of recoupment or  
24 offset is a legal issue to be determined. But why in the world  
25 would we want to like decide that issue by sending -- allowing

1 those contracts to go someplace else. By allowing the  
2 servicing to go to some other entity pending a determination of  
3 whether or not there's the legal right to offsets means you've  
4 decided the issue, because if the servicing is gone, you don't  
5 have that fund of money to cause the recoupment or the offset.  
6 It's gone. It's been decided for us.

7           But rather than denying the motion, I'm going to  
8 continue this just as a final hearing because her arguments are  
9 well taken in the sense that she has a -- 51 percent. It is  
10 performing, so there's money coming in. And so, arguably,  
11 there are rights to terminate the contract. And since I'm not  
12 being paid to lift stay to cause that, I'm going to deny  
13 Ms. Chubb's motion. I understand her problem, but that problem  
14 to me is fatal. We don't have a real movant. We don't have a  
15 movant on a particular loan -- or when I say movant, I mean the  
16 amalgam of the 51 percent. And I appreciate Ms. Davis solving  
17 my problem of determining what 51 percent meant, holders of  
18 claims or claims held, which -- so Ms. Chubb's motion is denied  
19 because there is no real movant.

20           Secondly, there's no basis to lift the stay for  
21 non-performing loans at least, vis-a-vie, the way the motion  
22 was stated, because the motion was, in essence, lift the stay  
23 so we can go collect the loan. Excuse me. If there's no money  
24 coming in, you're not harmed because there's no money coming  
25 in. To the extents -- now to the extent that you say it's

1 non-performing and you want to go foreclose, the motion was not  
2 predicated in that manner. And it may be on a case by case  
3 basis that that's a valid motion to bring, and it may well be  
4 the debtor will say fine, you take this dog. But that wasn't  
5 the motion that was brought.

6 Vis a vie performing, again, I don't have a movant in  
7 her case, and it indicates for the same reasons I've indicated  
8 to Ms. Davis. It is too soon to take the jurisdiction away  
9 from the ability to cause these -- to do the adjustments.

10 There's one tent here. Everybody is invited to the  
11 party and once certain people start leaving the party because  
12 they think they're better than everybody else in the party,  
13 then there's no way of doing the adjustments. And they may be  
14 -- let me caution. They may be absolutely correct. They may  
15 -- it may well be there's absolutely no legal theory by which  
16 these offsets or recoupments could be done. And it may well be  
17 that you're forced to file suits in other jurisdictions.

18 Now one thing for the trustee to look ahead to is  
19 I've taken at your word that you will, indeed, start the  
20 process and start making the payments as soon thereafter as you  
21 get actual authorization. And I think Ms. Davis is right in  
22 the sense that you're going to have to come up with a mechanism  
23 by which if you believe that somebody has been overpaid and  
24 should not be paid because of that, you're going to have to do  
25 a due process -- whether it's -- it still may be lawsuits,

1 because I'm afraid that you have to do -- I don't know that you  
2 do recoupment outside of -- assuming that theory is viable over  
3 said all, I'm not sure if you have to bring an adversary for  
4 that. That's something you have to look at.

5           Maybe the thing that I would encourage all of you  
6 that represent investors to save yourself time and money is  
7 agree that it can be done by motion and just adopt the  
8 contested proceeding procedures. I'm just suggesting it. You  
9 have the absolute right, if an adversary is required, to call  
10 an adversary, but you also have the absolute right to treat any  
11 contested matter as an adversary. And of course, we can  
12 schedule them for early trials. You know, you'll get done  
13 faster if we do it motion wise, because, you know, just by the  
14 nature of the way the adversaries work, they don't get set on  
15 scheduling conferences for a while. We could probably do a  
16 faster procedure. I would urge you to, when you're all talking  
17 this next month, look at that as a procedure, how you want to  
18 go about doing that, because those issues need to be resolved  
19 sooner rather than later, and everybody needs to know where  
20 they stand in the process.

21           You had a clarification -- question for  
22 clarification?

23           **MS. DAVIS:** I did, Your Honor.

24           **THE COURT:** Uh-huh.

25           **MS. DAVIS:** And thank you. I appreciate your ruling

1 and your findings. In the meantime, between now and the final  
2 hearing on the relief from stay motion by Mr. Canepa, may I  
3 also have an order that we will maintain the status quo, there  
4 will be no extension of the loan, there will be no increase in  
5 the funding.

6           **THE COURT:** Unless there's a separate order. And I  
7 guess that's going to be the July -- June 21st hearing.

8           **MS. DAVIS:** We will argue that then, Your Honor.  
9 But, you know, absent an order --

10          **THE COURT:** Yes, exactly, status quo. And it's clear  
11 that everything is a status quo in the meantime.

12          **MS. DAVIS:** Thank you.

13          **THE COURT:** Uh-huh.

14          **MS. SCANN:** Your Honor, I would object to that as  
15 representing the borrower. I think I'd like --

16          **THE CLERK:** I'm sorry. Could you speak closer to  
17 the microphone?

18          **MS. SCANN:** Susan William Scann. I'd like to at  
19 least keep that on -- it's on for a shortening time next week.  
20 I'd like to at least keep it on.

21          **THE COURT:** Yes.

22          **MS. DAVIS:** No. I'm sorry --

23          **MS. SCANN:** I'm not talking about.

24          **MS. DAVIS:** Yeah, I'm --

25          **MS. SCANN:** 7/25.

1           **MS. DAVIS:** Yeah, I think --

2           **THE COURT:** June 25.

3           **MS. DAVIS:** I think that Ms. Scann misunderstood.

4 What we're saying is subject to any ruling at that hearing.

5 Otherwise, status quo maintained.

6           **THE COURT:** Yes.

7           **MS. DAVIS:** Thank you.

8           **MS. CHUBB:** Is that true of all forums?

9           **THE CLERK:** I'm sorry, Counsel. Could you speak into  
10 one of the microphones, please?

11           **MS. CHUBB:** I'm sorry.

12           **THE COURT:** Yes. This presumes that the debtor --  
13 what the debtor is saying is -- that the representation is the  
14 money comes in, it's put in the account. It's accounted for.  
15 You -- I think you take the position that you can't make any  
16 additional advancements, et cetera, without the permission of  
17 the investors and/or permission of the Court. Is that correct?

18           **MS. JARVIS:** Well, every action we take we look  
19 carefully at the loan servicing agreement. Some of them  
20 require consent of the lenders, in which case, you know,  
21 additional funding, et cetera, we brought -- we bring to this  
22 court. We're not doing anything that, you know, we can't do  
23 normally, that we don't bring to the Court.

24           In addition, as you know, there are some issues that  
25 we can do under the contracts, like give the partial releases.

1 But because those were, you know, issues that we wanted to make  
2 sure everyone had a chance to be heard on, we brought those to  
3 the Court anyway.

4           **THE COURT:** Okay.

5           **MS. JARVIS:** You know, there are things like, you  
6 know -- I mean forbearance, for instance, we don't necessarily  
7 have to get permission. But again, we have filed a motion to  
8 bring that to the Court. So anything of a sensitive nature,  
9 even if we have the absolute right to do it under the servicing  
10 agreement, we have been careful to follow procedures to bring  
11 to this court so that parties have an opportunity to be heard.

12           **THE COURT:** Okay. So just to clarify, vis a vie  
13 Ms. Chubb's motion, her motion was denied. But vis a vie the  
14 motion to withhold, that's granted on the condition that the  
15 status quo stays the same except to the extent that you are  
16 allowed to do something under the loan servicing agreement  
17 and/or have a court order.

18           **MS. JARVIS:** Correct, and that is exactly what we  
19 asked for, Your Honor. We were not asking for any substantive  
20 determinations as to who these funds --

21           **THE COURT:** Right.

22           **MS. JARVIS:** -- belong to, just merely a maintenance  
23 of the status quo.

24           **THE COURT:** Right.

25           **MS. JARVIS:** And let me just clarify, Your Honor. We

1 have approximately \$65 million in the collection account. We  
2 do intend to -- our motion is intent to distribute that. I  
3 mean this -- you know, it was suggested that we weren't really  
4 going to distribute anything and we were just going to say it's  
5 gone -- going to go on and on determining -- no. Our intent is  
6 to sort these out, come up with a mechanism to deal with it,  
7 and distribute the 65 million to investors that now sits in the  
8 collection account.

9           **THE COURT:** Okay.

10           **MR. MEROLA:** Your Honor, just real briefly, a  
11 housekeeping matter, because I think things are going to thin  
12 out after you resolve this one. And because it's a consumer  
13 case and we have a lot of people, I hate to be the ugly voice  
14 of reality, but July 25th is shaking up to be Christmas, my  
15 birthday, Mardi Gras, and New Year.

16           **THE COURT:** Yeah.

17           **MR. MEROLA:** We argued this for three-and-a-half  
18 hours.

19           **THE COURT:** I know. You've got the whole day.

20           **MR. MEROLA:** We have another hearing date on August  
21 4th. Now I'm not suggesting anything specific should be moved  
22 there. But it might be better for all concerned, since so many  
23 of the investors either listen on the telephone or stay here,  
24 that we're more realistic about how much we can accomplish on  
25 the 25th, and that there are other matters -- it's just a week.

1 We're not really trying to ruin anyone. But to be more  
2 realistic about how many matters we can handle on the 25th, I  
3 have a feeling that the motion to distribute funds, with  
4 whatever procedure the debtor comes up with, might be a full  
5 day problem. And then there's lots of other things that keep  
6 getting kicked to July 25.

7           **THE COURT:** Well, you know, there's something to be  
8 said for that. Let me just talk aloud and hear. I want that  
9 motion heard on full notice, if you will, full meaning 30 days,  
10 25 days. It may -- rather than an arguable order for any time,  
11 maybe it does make more sense to order that you file that  
12 motion by July 7th and then it heard August 4th. That's not  
13 quite 30 days, but we're close enough. Does that -- I'll let  
14 you talk about that during the break, the timing issue.

15           Let me indicate one other thing. Any other things  
16 you want to talk about during the break on this issue? No.  
17 Okay. Now on -- I know you think it's going to be easy, but I  
18 got some problems with the confidential -- well, and of course,  
19 there was some fights about it. I've got some problems with  
20 the confidential -- the committee confidentiality. Let me tell  
21 you what my basic concern is, so you can talk about it during  
22 the break. And I've got my list -- my Chapter 13 calendar is  
23 not until 2:00 now. So I moved them until 2:00, but in any  
24 case, my concern on the confidentiality agreements and the  
25 protocol for how you deal with the committee's -- because of

1 the new amendments to BAPCPA.

2 You know, I appreciate the fact that you copied the  
3 order from *Revco*, but this isn't -- I mean *Revco* has similar  
4 problems but not quite the same problems. I am hard pressed to  
5 understand what really there is in the way of confidential  
6 information. So one thing I'm going to want to know -- and  
7 maybe what we should just do is continue this to next week --  
8 is I want to know what in the worlds kind of confidential  
9 information are you talking about. I tend to think that  
10 Mr. Gordon's revision of the agreement is probably a bad one,  
11 because when you define confidential information in your  
12 footnote, in your pleading, it's like everything is  
13 confidential.

14 I mean it's a great boiler plate, but we're not  
15 talking about a public company. I mean a public company in the  
16 true sense. Nor are we talking about a company in which you've  
17 got trade secrets. I mean, you know, maybe the trade secret  
18 was how in the world they did all this. But, you know, not  
19 legitimate trade secrets. So that's my concern. You can talk  
20 about that for a few minutes during the break. If you'd rather  
21 just, with those thoughts, continue it.

22 And then I think that's all other than I did want to  
23 talk about whether or not we really should hear some of these  
24 things on the 25th. I need to -- I know Mr. Gordon had  
25 objected. Oh, one thing. I, quite frankly, don't think the

1 attorney's protocol fees should be June 25th.

2           **MS. JARVIS:** Well, let me -- yeah, let me address  
3 that, because we actually -- the only reason we put it there is  
4 we need to know for budgeting purposes. We need to have some  
5 -- I mean on an ongoing basis we've got to know where we're  
6 heading, because this is very important for budgeting. What we  
7 were going to propose to the committees this afternoon is that  
8 the committee counsel and professionals simply agree to submit  
9 statements in July, so we can know for budgeting purposes, and  
10 we continue the motion until July 25th.

11           **THE COURT:** Okay.

12           **MS. JARVIS:** And the reason why we want to do that,  
13 we have no intention of asking, you know, for professionals to  
14 be paid before we ask for investor funds to be distributed.  
15 That's important. And --

16           **THE COURT:** Okay. This was just a protocol. I think  
17 that --

18           **MS. JARVIS:** Yes.

19           **THE COURT:** Makes more sense.

20           **MS. JARVIS:** Yes.

21           **THE COURT:** Okay. So we'll take a --

22           **MS. SCANN:** So, Your Honor.

23           **THE COURT:** Yeah, Ms. --

24           **MS. SCANN:** One other -- you had indicated at the  
25 beginning that you wanted to talk at the end about the order

1 shortening time for next week. The hearing is on the 21st.

2           **THE COURT:** That was what I was talking about, these.

3           **MR. MEROLA:** That was -- right.

4           **MS. SCANN:** Oh, there were -- so that doesn't apply  
5 to the -- there's an application to forbear, that's the one  
6 that I'm interested in, the debtor's application to forbear, to  
7 allow funds to be used in one of the particular loans, Franklin  
8 Stratford. Those are still going to go forward then on the  
9 21st?

10          **THE COURT:** Well, talk about it on the break and see  
11 whether or not it really should. And Mr. Gordon was the one  
12 that raised those objections. So I guess what I just wanted to  
13 say is I was willing to say is I was willing to listen to about  
14 -- wait a minute, does this really have to have then, can it be  
15 continued as opposed to does it need to be heard then. And  
16 that was my only concern, because --

17          **MS. SCANN:** Yeah.

18          **THE COURT:** -- I did sign the order shortening time.  
19 And then I'm thinking after the fact, wait a minute, some of  
20 these things could wait. I mean, in essence, I've sort of  
21 spoiled you, because you get a two-week turnaround on all this  
22 stuff. Well, you know, normally, it would be 30 days. You  
23 know, everybody has gotten so used to a two-week turnaround.  
24 And of course, we've done a lot in the beginning, you know, for  
25 example, like hiring the counsel. We had to put that on for

1 the 25th, because counsel has to know whether or not they're  
2 employed.

3 **MS. SCANN:** Right.

4 **THE COURT:** So look at what you've got set on this  
5 latest order shortening time for the 25th to see if that's  
6 something that should --

7 **MS. SCANN:** You mean for the 21st?

8 **THE COURT:** 21st. Excuse me.

9 **MS. SCANN:** Right.

10 **THE COURT:** I keep messing up those days. June 21st.  
11 I apologize.

12 **MS. SCANN:** June 21st.

13 **THE COURT:** All right. So with that, we'll take  
14 about a five --

15 **MS. CHUBB:** Did you --

16 **THE COURT:** I'm sorry.

17 **MS. CHUBB:** Did you rule on the motion to pay and the  
18 motion to withholding payment?

19 **THE COURT:** Yeah.

20 **MR. MEROLA:** That was ruled.

21 **THE COURT:** Well, that's what I just said. I said on  
22 the motion to withhold I would grant -- I guess I got  
23 interrupted. I'm sorry. I -- yes, I'll grant that motion  
24 pending -- until July 25th.

25 **MS. JARVIS:** Well, actually, if you're pushing it

1 back to August 4th, you know, time to extend --

2 **THE COURT:** Oh, August 4th, which --

3 **MS. JARVIS:** We need to August 4th.

4 **THE COURT:** And the reason being, I find there's good  
5 reason to withhold the payment, so that the debtor can do the  
6 accounting as between the parties to preserve all the rights  
7 the debtor may have, if any --

8 **MS. CHUBB:** Okay. Well, may I have my --

9 **THE COURT:** -- to recoup but are set off, et cetera.

10 **MS. CHUBB:** May I have my motion continued to the 4th  
11 of August too then?

12 **THE COURT:** Which motion?

13 **MS. CHUBB:** My motion to pay. I have --

14 **MR. MORELA:** It was denied.

15 **THE COURT:** Yeah, I have no -- you know, the only  
16 problem with that is I appreciate exactly what you're saying,  
17 but Ms. Jarvis' motion is going to be much more complete.

18 **MS. CHUBB:** Well, that's fine, and you can ignore  
19 mine on that date if it turns out. But I haven't seen her  
20 motion. I don't know what it's going to say.

21 **THE COURT:** Well --

22 **MS. CHUBB:** It may be, you know, to pay two people.  
23 I like my motion to pay more.

24 **THE COURT:** Well, but I don't have -- I mean the  
25 problem with your motion is you don't tell me who you want to

1 pay and what the basis is. You just say you want to pay them,  
2 because they're your clients.

3           **MS. CHUBB:** I say I want to pay them because it's  
4 their money.

5           **THE COURT:** They're your clients. You don't give any  
6 basis what loan they've got, how much they're owed, whether  
7 they're performing, whether they're non-performing.

8           **MS. CHUBB:** You're saying you can withhold until  
9 then, and I'm saying on that date I want to know if they have  
10 to pay.

11           **THE COURT:** I guess we can continue it, but --

12           **MS. CHUBB:** Well --

13           **THE COURT:** You're going to have to -- the motion as  
14 written isn't sufficient. You decide what you want to do.

15           **MS. CHUBB:** Okay. Well, maybe I supplement. Thank  
16 you.

17           **THE COURT:** I mean we don't know who you want to pay  
18 and what basis and what loan.

19           **MS. CHUBB:** I want every client that I have who is in  
20 a performing loan whose --

21           **THE COURT RECORDER:** I'm sorry. You're too far away  
22 from the microphone again.

23           **MS. CHUBB:** -- whose money they are holding to get  
24 paid. And they don't want to do it, and that's fine. But I  
25 don't want to just be --

1                   **THE COURT:** That's not what we said. I don't know  
2 where you've been for two hours -- three hours.

3                   All right. Let's take a short recess and we'll talk  
4 about the committee issues.

5                   **THE CLERK:** All rise.

6                   **(Recess taken from 1:30 p.m. to 1:46 p.m.)**

7                   **THE CLERK:** Bankruptcy court is now in session.

8                   **THE COURT:** Be seated. You know, I don't think I  
9 specifically addressed Mr. LePome's motion which was that  
10 motion was denied, however, without prejudice to the defenses  
11 that are raised in the interpleader suit.

12                  **MR. SCHWARTZER:** That would be --

13                  **MR. LePOME:** Ma'am, I have no problem with getting  
14 the interpleader.

15                  **THE COURT:** Okay. Thank you.

16                  **MR. SCHWARTZER:** Okay. So we'll prepare an order  
17 saying denied without prejudice?

18                  **THE COURT:** Yes.

19                  **MR. SCHWARTZER:** And there's also, I think, one by a  
20 Mr. Ben Encasa (phonetic) on the same basis that he --

21                  **THE COURT:** I did that the last time. I don't --

22                  **MR. SCHWARTZER:** He did it. I think he filed  
23 something else, a new motion and set it -- somehow set it on  
24 calendar today too. So I just want to make sure the new motion  
25 is also denied --

1                   **THE COURT:** Right.

2                   **MR. SCHWARTZER:** -- without prejudice.

3                   **THE COURT:** Right. Okay.

4                   **MR. MEROLA:** Your Honor, based on your comments on  
5 the committee protocol, we'd like to kick that over to next  
6 week and the debtor wants to file a supplemental declaration to  
7 address the confidentiality issue you raised.

8                   **THE COURT:** Okay, good. Because again, what I'm  
9 looking at is it's one thing to say keep confidential  
10 information but I have no real sense of what is confidential.

11                  **MR. MEROLA:** And I think that issue is best developed  
12 on a complete evidentiary record and we'll let Mr. Allison  
13 submit a declaration.

14                  **THE COURT:** Okay, good.

15                  **MR. GARMAN:** Your Honor, on behalf of the direct  
16 lenders committee, I'm happy to kick the confidentiality  
17 agreement issue over for another week and we can deal with it  
18 next week. But we're at a log jam which is impacting the case  
19 and perhaps it's just best to address it now.

20                  **THE COURT:** Hang on a second. Do -- is security out  
21 there?

22                  **MR. UNIDENTIFIED:** Right here.

23                  **THE COURT:** Okay, thanks. The marshals.

24                  **COURT RECORDER:** And would you make your appearance  
25 please for the record?

1                   **MR. GARMAN:** I'm sorry, Greg Garman with Gordon and  
2 Silver on behalf of the direct lenders committee.

3                   **COURT RECORDER:** Thank you.

4                   **THE COURT:** Okay, sorry.

5                   **MR. GARMAN:** Your Honor, the direct lenders committee  
6 is a different animal, dramatically different in fact.

7                   While there may not be a need for typical unsecured  
8 creditors, trade creditors, to have access to things like  
9 notes, appraisals, deeds of trust and the like, both under the  
10 Nevada Administrative Code and under the Loan Servicing  
11 Agreement, these are documents --

12                  **THE COURT:** Right, but are they denying you access to  
13 the notes?

14                  **MR. GARMAN:** Yes. Right now, we've been unable to  
15 negotiate a confidentiality agreement with the debtor and I've  
16 been unable -- I had to issue a subpoena on Friday to try and  
17 get the names, addresses, e-mail, contact information and the  
18 identity of the loans that our individual constituents were on.

19                  **THE COURT:** So why is that even possibly  
20 confidential?

21                  **MS. JARVIS:** We don't have that, your Honor. I mean,  
22 we've got notes with people's listed -- you have to create  
23 somehow a list of each of the investors and figure out their  
24 addresses. We have to take and try to mix and match them  
25 ourselves. I mean, we don't have that information to turn

1 over. We have notes we can turn over but we don't have, you  
2 know, kind of the notes with addresses.

3 **MR. GARMAN:** Okay.

4 **THE COURT:** Okay. Well, the motion also -- and the  
5 motion dealt with 1108 duties or not 1108, 1106 duties. It  
6 didn't deal with getting information from the debtor.

7 **MR. GARMAN:** No, your Honor, I --

8 **MS. JARVIS:** And, your Honor, there actually is a  
9 different section between the planning committees who actually  
10 are -- they, themselves, are participants in certain loans and  
11 the direct lenders committees, who their constituents are  
12 participants in certain loans, but the committee itself is not  
13 participants in that loan.

14 So those are issues we just need to sort out and, you  
15 know, what we would like to do is to have the opportunity this  
16 week to identify -- because I think what your Honor is saying  
17 is, you know, the confidential -- the confidentiality, I'm just  
18 not sure what you're talking about. We would like to identify  
19 what we think is confidential and would like preserved in the  
20 -- so the burden shifts to us now to come up with kind of a  
21 list of things that we think need to be held confidential and  
22 need to be put in that confidentiality agreement.

23 **THE COURT:** But again though, the motion though dealt  
24 with the committees duties to respond, right? It didn't deal  
25 with --

1                   **MS. JARVIS:** What it did -- right. I mean, you could  
2 enter the order on the committees' duties to respond because  
3 all it says is that if they get confidential information this  
4 is how it's protected given the new changes in the code.

5                   What -- the issue we had with this is that we would  
6 like to reach an agreement on a single confidentiality  
7 agreement so that we don't end up having to live by two  
8 different rules.

9                   **THE COURT:** Well, and my concern also went broader.  
10 I mean, I was focusing on the committees' duties to its  
11 clientele. I thought quite frankly the confidentiality  
12 agreements that the committee wanted to negotiate vis-à-vis  
13 their clientele was too broad. I and let me -- so I think  
14 Congress amended that section for a reason and to take it all  
15 back again to me without some good reason and/or explanation,  
16 "What in the world are you talking about?" is too broad. All  
17 these investors deserve to know --

18                   **MR. GARMAN:** Your Honor, I share your opinion and let  
19 me tell you what my opinion of the protocol motion is.

20                   **THE COURT:** Well now, you can do one of two things.  
21 We can argue this today or not.

22                   **MR. GARMAN:** Your Honor, I'm happy to go talk with  
23 the debtor. However, the problem is that there are meetings  
24 today with the committee members.

25                   **THE COURT:** Well, what do you need between now and

1 then and what -- how are you going to get it and what do you  
2 want?

3           **MR. GARMAN:** We will again attempt to address with  
4 the debtor the confidentiality and try to get access to  
5 distributory constituents by next week.

6           **THE COURT:** Well, what do you want between now and  
7 then?

8           **MR. GARMAN:** I'd like access to some information from  
9 this debtor. I'll tell you. That's what I'd like.

10          **THE COURT:** Well, what haven't you given them?  
11 You've given them notes, right?

12          **MR. GARMAN:** They've given us nothing.

13          **MS. JARVIS:** Well, let me tell you, your Honor. Last  
14 week we also had a meeting with the committees because we have  
15 been working very hard to try to get these statements done and  
16 we did ask the committees, "Give us a break. Let us please  
17 concentrate our efforts on getting this." There was an  
18 agreement among the committees that they would try to give us a  
19 list of due diligent stuff that they needed so we could provide  
20 it in an orderly manner. It's very, very difficult to take --

21          **THE COURT:** Why don't you just let them come in --  
22 because the problem is and I know how this works. If you want  
23 File A and the auditor is working on File A, then the file  
24 can't work on File A.

25          **MR. GARMAN:** Oh, of course, I appreciate that, your

1 Honor.

2           **THE COURT:** So, I see two separate issues. Again,  
3 one is what does the committee have to disclose to its members  
4 and separate and apart which is not before me is any kind of  
5 motion to compel or suggestion that they're just not turning  
6 things over then. That's not in any of these motions. The  
7 only motion I have is what is the -- what must be disclosed  
8 from committee counsel and the committee to its constituency.

9           **MR. GARMAN:** I agree with that. I think that the  
10 issue of the confidentiality was raised in their supplemental  
11 pleading they filed yesterday and that was what I was  
12 addressing. So, that's where I came from, your Honor.

13           **THE COURT:** Okay. Well, I'm going to want to know  
14 again what in the world is confidential in this case on both  
15 sides, from -- going from you to the committees and from the  
16 committees to constituency.

17           **MR. GARMAN:** So we'll address that, bring it back  
18 next week and hopefully we'll work it out.

19           **THE COURT:** Okay. Yes. Now on -- you know, I didn't  
20 bring out that list of what's next week. I think we agreed  
21 that the protocol motion would be continued to the -- on the --  
22 excuse me. The fees will be continued until July 25th,  
23 correct?

24           What's the decision on the motion to distribute?  
25 Does August 4th make more sense to everyone?

1           **MS. JARVIS:** That's fine.

2           **MR. UNIDENTIFIED:** Yes.

3           **THE COURT:** Okay. So August 4th will be the motion  
4 to distribute as long as the motion is filed by July 7th.

5           **MR. MEROLA:** Your Honor, we had a discussion,  
6 Mr. Schwartzer and I. It seems to me that everything involving  
7 payment, whether it's relief from stay, whether it's a motion  
8 to suspend --

9           **THE COURT:** Okay. I agree.

10          **MR. MEROLA:** -- whether it's a motion to terminate,  
11 should all be on one day and then everything else which by that  
12 time will probably be some modifications of loans,  
13 administrative stuff, the Knudson (phonetic) procedure, put  
14 that all on the other day.

15          **THE COURT:** Okay. Now let me indicate to you, if  
16 it's not filed by tomorrow nothing is going on that July  
17 calendar. I'm not going to sign -- I'm not going to have  
18 anybody sign orders shortening time. So if you think you want  
19 something filed for that July 25th calendar that isn't already  
20 filed --

21          **MR. SCHWARTZER:** No, today is June 15th.

22          **COURT RECORDER:** I'm sorry, Counselor, could you  
23 speak into a microphone please?

24          **MR. SCHWARTZER:** I'm sorry. Your Honor, today is  
25 June 15th. To get on the July 25th calendar wouldn't we have

1 until --

2           **THE COURT:** Oh, right.

3           **MR. SCHWARTZER:** -- June 28th?

4           **THE COURT:** Okay. But what I mean is no order  
5 shortening time.

6           **MR. SCHWARTZER:** Yes.

7           **MR. MEROLA:** I understand.

8           **THE COURT:** Sorry. I'm sorry. Who does CPR around  
9 here? They've got those little machines hanging on the wall.  
10 I apologize.

11          **MR. UNIDENTIFIED:** We lost 12 days.

12          **THE COURT:** Yes.

13          **MR. LePOME:** Your Honor, wished to be reminded about  
14 the 21st of June and the order shortening time there.

15           One month ago, I filed notice with the Court and it's  
16 been circulated to everybody and of course it's on the internet  
17 now that I'm going to be in Hawaii at the bar convention. I'm  
18 partnering on this case with Nancy Allf. That has to be now  
19 signed off on by all of my clients because of a new ethical  
20 rule that went into effect May 1st and we can't then respond to  
21 everything on these orders shortening times because of those  
22 situations. I can't even appear and neither can -- even if I  
23 get my co-counsel on board, she can't appear either.

24           So, we've got a real problem and I wish to address  
25 mostly, I'm not going to address it now, but we need a real

1 problem in addressing the \$58 million proposed loan with no  
2 payments for a year at 7 1/2 percent.

3           **THE COURT:** Well, get somebody here to represent  
4 your client.

5           **MR. LePOME:** That's all on short -- of shortening  
6 time.

7           **THE COURT:** I mean --

8           **MR. LePOME:** Can we move that to the 25th? That's  
9 what I --

10          **THE COURT:** Which motion is this one?

11          **MR. LePOME:** The one that you just shortened the time  
12 on to approve an agreement with partners --

13          **THE COURT:** Okay.

14          **MR. LePOME:** -- that's set for the --

15          **THE COURT:** And why does that have to be heard on  
16 the 21st as opposed to July 25th?

17          **MR. LePOME:** That's what I can't figure out.

18          **THE COURT:** That's what I'm asking counsel.

19          **MS. JARVIS:** Your Honor, the reason we know it's set  
20 for July 21st is there are some transactions pending which  
21 would close in the next month on -- that involve the collateral  
22 that we've asked for and, therefore, we don't want to lose the  
23 opportunity to monetize some of that collateral and bring that  
24 back into the estate. That's our concern as to why we've asked  
25 for it to be heard immediately.

1                   **THE COURT:** Okay. Well, and you're telling me that  
2 everything has -- the things have to close by July 25th in the  
3 meantime?

4                   **MR. SCHWARTZER:** Well, some things. For example, on  
5 the motion to approve the agreement with investment partners.  
6 There are some other -- there are things that will occur  
7 between June 21st and July 25th. We think there's going to be  
8 a sale of the Royal Hotel in which there should be -- that  
9 portion of the deal will be monetized.

10                  We need to have the motion at least on calendar to  
11 make sure we have the approval to accept that as a partial  
12 payment --

13                  **THE COURT:** Okay.

14                  **MR. SCHWARTZER:** -- under the agreement.

15                  **THE COURT:** All right. Well, we'll have to keep it  
16 on. Whether or not I grant it or continue it for that day is a  
17 different story. I will give you until three days before -- of  
18 course, you know, it's final June 12th. So 10 days is June 20  
19 -- I'm sorry, it's final the 12th, the 21st.

20                  **MR. SCHWARTZER:** Yes.

21                  **THE COURT:** Okay. So I'll give you until Monday to  
22 file your oppositions on that then.

23                  Why in the world did you guys wait until June 12th to  
24 file those? You know, you told us you had it on Friday. It  
25 never got submitted until Monday.

1           **MS. JARVIS:** It was -- on the IP it was barely -- we  
2 had a previous agreement that had been offered to us. It was  
3 not acceptable. It was finally signed up, you know, to be  
4 acceptable right before that time.

5           **MR. SCHWARTZER:** I think the motion was filed on the  
6 19th.

7           **THE COURT:** No.

8           **MR. SCHWARTZER:** It would have shortened time.

9           **THE COURT:** None of that ever came through until  
10 Monday. Nothing was uploaded until Monday.

11          **MR. SCHWARTZER:** I think the order shortening time  
12 was not uploaded until Monday, your Honor.

13          **THE COURT:** Right. And so --

14          **MR. SCHWARTZER:** I understand the motion was filed --

15          **THE COURT:** Well, did anybody know about the motion?

16          **MR. SCHWARTZER:** The problem is is getting -- trying  
17 to get information back from five counsel on a request for a  
18 order shortening time. The rules require us to send something  
19 out and we did it by e-mail on that day and then you have  
20 committee counsel who then feels on some things they have to  
21 speak to their committee chairman.

22          **THE COURT:** Well, all right. I'll hear it on the  
23 21st but, you know, I may continue it and I may --

24          **MR. SCHWARTZER:** I -- we understand.

25          **THE COURT:** -- continue it until July 25th. I am not

1 going to have a visiting judge hear this and I apologize but,  
2 you know, I -- this case came about late. And again, most  
3 cases get heard on 30 days notice. I mean, two weeks' notice  
4 is nuts. So, you know -- and the only reason I signed it was  
5 because of that and I probably shouldn't of because, you know,  
6 I shouldn't --

7           **MR. SCHWARTZER:** Well, we can tell you that it's very  
8 important that both that motion and the motion to forbear at  
9 least in part be considered on the 21st, your Honor.

10           **THE COURT:** Well, they're going to be --

11           **MS. JARVIS:** And the DIP motion.

12           Your Honor, we are meeting with the committees this  
13 afternoon to go through in detail with them about these three  
14 motions. That was what we had noticed beforehand because we  
15 understand that it is on shortened time.

16           It will be fine with us if the responses -- we prefer  
17 that they be by noon on Monday so we have at least one day to  
18 reply.

19           **THE COURT:** Okay. All right. So I'll give everybody  
20 Monday until noon to file their oppositions. Everyone must get  
21 me immediately their courtesy copies and then file their -- you  
22 know, I guess you'll have -- I guess we'll just have to orally  
23 hear a reply.

24           **MR. MEROLA:** Your Honor, as a housekeeping matter,  
25 there seems to be a mistake in the case management order. On

1 these OSTs, I thought it was the Court's order that replies be  
2 within three business days not five and the order says five and  
3 that's caused a little disconnect about when things are due.

4           **THE COURT:** Okay. So -- I'm sorry, the order says  
5 what?

6           **MR. SCHWARTZER:** It says that --

7           **MR. MEROLA:** Oppositions, I'm sorry.

8           **MR. SCHWARTZER:** -- the oppositions --

9           **MR. MEROLA:** The oppositions to motions on OSTs.

10          **THE COURT:** Well, I probably did originally do --  
11 well, no, it should be at least two days before because rarely  
12 will I have these ten days and that's what was the problem  
13 because you guys didn't get this uploaded to me in time.

14          **MS. JARVIS:** Your Honor, can I ask, I know that --  
15 you know, he has the problem of dealing with the four different  
16 committees and trying to get everybody to agree and  
17 orchestrating a time.

18          Is there any way we could simply --

19          **THE COURT:** Just obviate that requirement. Just  
20 submit them.

21          **MS. JARVIS:** Can we file them, the motion?

22          **THE COURT:** Just file them.

23          **MS. JARVIS:** That was the problem in the delay. And  
24 then we can --

25          **THE COURT:** So just file them. And again, I normally

1 would not sign in less than ten days but I was told this was  
2 coming Friday and never got it until Monday, so. I even looked  
3 all weekend for the order and didn't get it. All right. So  
4 we'll have the 21st but the attorney motion is not -- that will  
5 be moved until July 25th.

6 If you, all of you would talk about the calendar of  
7 these matters and submit revised notices.

8 **MR. GORDON:** Your Honor, how much time do we have on  
9 the 21st, may I ask?

10 **THE COURT:** We have all day.

11 **MR. GORDON:** Okay. Because I'm -- with regard to the  
12 DIP loan and with regard to the --

13 **THE COURT:** Well, I know, it's going to be  
14 controversial.

15 **MR. GORDON:** I'm going to anticipate that -- that  
16 those hearings are going to take all day giving testimony.

17 **THE COURT:** Yes. I have all day. I have two o'clock  
18 scheduling conferences but that will take a half an hour.

19 **MR. GORDON:** So the other matter and we're trying to  
20 rush around getting answers -- responses to in these motions is  
21 -- the other one is the Fertitta, the motion to disqualify.

22 **THE COURT:** Oh, that reminds me. You know, I don't  
23 know the answer but I have a concern about committee counsels  
24 representing one particular entity and they are voted to stay  
25 on the committee. I only alert you to that because I don't

1 want you to get taken up by the side later when I say, "Wait a  
2 minute. What were you doing representing him, whether or not  
3 he wins or loses, as opposed to his counsel?"

4           **MR. GORDON:** What I was going to say in this case is  
5 the following. Given the time, given the -- now that issue  
6 that the Court has raised which we need to look at, I don't see  
7 any reason why this needs to be on for the 21st. There's no  
8 reason for it to be. Why isn't --

9           **THE COURT:** Well, because he's going to be the person  
10 then. If he's on the committee, he's going to dominate as to  
11 whether or not what happens on the 25th, that's the problem.

12           **MR. GORDON:** He's one of six members on the  
13 committee. He's one vote of six members on the committee.

14           **THE COURT:** Well, but that's the -- but the problem  
15 is --

16           **MR. GORDON:** I'm just saying that --

17           **THE COURT:** -- if it's somebody else that should be  
18 on there. That's a real problem.

19           **MR. GORDON:** Your Honor, then have it but I'm just  
20 saying I anticipate that when we're on the 21st we're not going  
21 to hear everything. I'm just trying to figure out what we can  
22 do to get matters continued over so that we're prepared to deal  
23 with those issues that need to be dealt with.

24           **THE COURT:** Okay. So -- okay. So if you provide us  
25 revised schedules. You have all day on the 21st except for a

1 half hour I've got some scheduling conferences.

2           **MS. SCANN:** Your Honor, we still have that motion to  
3 forbear on the 21st. I had talked to Mr. Gordon. He doesn't  
4 have an objection to the Franklin Stratford portion of its days  
5 on the 21st --

6           **THE COURT:** Okay.

7           **MS. SCANN:** -- because that's absolutely crucial to  
8 Franklin Stratford, my client.

9           **THE COURT:** Okay. All right. So I'll let the  
10 parties do a revised schedule. Just make sure everybody is  
11 noticed vis-à-vis a telephone number. Make sure that telephone  
12 number is on the web.

13           Again, I appreciate your doing that. You know, you  
14 have the ability to use those services and you can charge  
15 individuals back. It may be -- that may be more -- harder than  
16 what it's worth.

17           Mr. Landis?

18           **MR. LANDIS:** I've tried not to say very much this  
19 whole hearing, your Honor.

20           **THE COURT:** You've been very good.

21           **MR. LANDIS:** And I want to make sure that I'm clear  
22 on one thing.

23           **THE COURT:** Yes?

24           **MR. LANDIS:** There were five motions filed on  
25 shortened time last Friday, June 9th.

1                   Am I correct in understanding that the parties, as a  
2 result of this colloquy, we have until noon on Monday to file  
3 resistances --

4                   **THE COURT:** Yes.

5                   **MR. LANDIS:** -- to all of those motions?

6                   **THE COURT:** Yes.

7                   **MR. LANDIS:** That's all I needed to know.

8                   **THE COURT:** Thank you.

9                   **MR. LANDIS:** Thanks, Judge.

10                  **THE COURT:** And thank you for clarifying that. All  
11 right.

12                  **MR. LEVINSON:** Your Honor?

13                  **THE COURT:** Uh-huh?

14                  **MR. LEVINSON:** Marc Levinson for the diversified  
15 committee.

16                  Following up on that last colloquy, what about the  
17 so-called Knudson motion which is now being kicked to July  
18 25th? Do we still need the responses on Monday for that?

19                  **THE COURT:** No, no, no. It's just those things that  
20 were set on shortened time.

21                  **MR. LEVINSON:** They will still be --

22                  **THE COURT:** By that I mean those things that were  
23 filed on June 12th for June 21st.

24                  **MR. LEVINSON:** That are still on for June 21st?

25                  **THE COURT:** That are still on for June 21st.

1                   **MR. LEVINSON:** Okay.

2                   **MR. MEROLA:** And, your Honor, many of us would have  
3 objected to some of the matters on OSC but your Honor  
4 lightening quick entered the orders. We reserve our right to  
5 object to the timing of and the scheduling of those matters on  
6 the merits.

7                   **THE COURT:** Yes, exactly, and I apologize. I didn't  
8 look at the schedules and I guess I was too sensitive to the  
9 timing and I should have thought about it some more. But  
10 again, you know, if the point is it can't be decided then I may  
11 well kick it. That's one of the reasons I want to address it  
12 in advance. Think hard about if you really think it has to go  
13 on that date because if it gets to that date, notwithstanding  
14 all your effort, and I say, "Wait a minute, this doesn't need  
15 to be decided now," I'll kick it and clearly we've taken care  
16 of the attorney issue, so.

17                  All right. Thank you very much. We'll take a recess  
18 while we change people here.

19                  **ALL COUNSEL:** Thank you, your Honor.

20                  **THE CLERK:** All rise.

21                  (**Proceeding was adjourned at 2:04 p.m.**)

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25

CERTIFICATION

I certify that the foregoing is a correct transcript from the electronic sound recording of the proceedings in the above-entitled matter.



July 9, 2010

signed

Dated

***TONI HUDSON, TRANSCRIBER***